

12-15-1981

Legislative Response to *Zurcher v. Stanford Daily*

J. Kirk Boyd

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

J. Kirk Boyd *Legislative Response to Zurcher v. Stanford Daily*, 9 Pepp. L. Rev. Iss. 1 (1981)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol9/iss1/5>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Legislative Response to Zurcher v. Stanford Daily

The author explores and surveys the legislative response to Zurcher v. Stanford Daily. While it is recognized that the debate and controversy is far from over, the resulting legislation, including the Privacy Protection Act of 1980, is viewed as being a significant contribution to the area of fourth amendment law. The author analyzes the applicable legislation in detail.

INTRODUCTION

The fourth amendment¹ limits the states' power to search and arrest by prohibiting "unreasonable" searches and seizures.² It is well established in fourth amendment case law that with few exceptions, a search or arrest is unreasonable unless it is based upon probable cause.³

1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

2. The first part of the fourth amendment prohibits unreasonable searches and seizures; the second requires that probable cause be shown before a warrant can issue. There has been considerable debate over when a warrant is required for a search to be constitutional. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court held that law enforcement officials had a right to conduct a warrantless search of a person incident to lawful arrest. In *Carroll v. United States*, 267 U.S. 132 (1925), the Court extended *Weeks* to include a warrantless search of whatever is found on a person or in his control incident to a lawful arrest. *Agnello v. United States*, 269 U.S. 20 (1925) established that enforcement officials could search the person and the place where the arrest is made. However, in *Trupiano v. United States*, 334 U.S. 699 (1948) the Court held that law enforcement officials must secure and use search warrants whenever reasonably possible. Subsequently, the Court rejected *Trupiano* and held that the test was whether the search was reasonable, not whether it was reasonable to procure a search warrant in *United States v. Rabinowitz*, 339 U.S. 56 (1950). The matter was further complicated in *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court held that whenever practical, police must get advance judicial approval in the form of a warrant in order to conduct a search. Finally, in *Chimel v. California*, 395 U.S. 752 (1969), the Court held that a search incident to a lawful arrest must be limited to the person of the accused and the area from within which he might obtain either a weapon or something that could be used as evidence against him.

3. *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963). "Unfortunately there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Mun. Court* 387 U.S. 523, 536-37 (1967).

In *Zurcher v. Stanford Daily*,⁴ the United States Supreme Court ruled five to three that the fourth amendment does not prevent or restrict the execution of search warrants to search for and seize evidence in the custody of parties not themselves suspected of criminal activities, even when the third party is a newspaper or media institution.⁵ The Court made no distinction between suspects and innocent parties when determining the criteria for the probable cause needed for an enforcement official to obtain a warrant to search.⁶ By so ruling, the Supreme Court reversed the district court's and court of appeals' rulings which had made a distinction between suspects and innocent parties.⁷ The lower courts in *Stanford Daily* argued that a distinction should be made between intrusions upon innocent individuals and intrusions upon suspects. This rationale was based on the premise that the fourth amendment affords greater protection to innocent individuals against searches and seizures than it affords to suspects.⁸ However, the Supreme Court refused to accept this interpretation of the fourth amendment, ruling instead that magistrates need not distinguish between suspects and innocent parties when issuing warrants to search and seize.⁹

The *Stanford Daily* decision has received considerable criticism from scholars, legislators, and the press since it was announced on May 31, 1978. Most of the criticism has been directed toward the Court's approval of the issuance of search warrants to search for evidence possessed by innocent third parties, including newspaper and media agencies.¹⁰

4. 436 U.S. 547 (1978).

5. Mr. Justice Brennan took no part in the consideration or decision of the *Daily* case.

6. Mr. Justice White, writing for the majority, stated: "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." 436 U.S. at 556 (1978).

7. 353 F. Supp. 124, (N.D. Cal. 1972). "[T]he Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved." *Id.* at 127.

8. *Id.* A search of a third party for materials in his possession is unreasonable and violative of the fourth amendment unless there is proper cause to believe the materials will be destroyed or a subpoena duces tecum is impractical.

9. "[C]ourts may not, in the name of Fourth Amendment reasonableness, prohibit the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." 436 U.S. at 560.

10. An editorial in the N.Y. Times, June 6, 1978, § A at 16, Col. 1, began: "The privacy rights of the lawabiding were shabbily treated by the Supreme Court"; As one commentator noted: "The decision has produced an outpouring of shock and dismay unprecedented in modern journalism." *Citizens Privacy Protection Act: Hearings on S.3162 and S.3164 Before the Subcomm. on the Constitution*

Criticism materialized into legislation. Many bills were introduced in Congress and went for mark up before the House and Senate Judiciary Committees.¹¹ The intent of this legislation was to supersede the minimum standard of probable cause set down by the *Stanford Daily* decision. Remedial legislation placed a new requirement for probable cause where the person believed to have the evidence is in no way connected with the crime, particularly with respect to newspaper and media personnel and facilities.¹²

Essentially the legislation served to reestablish the probable cause distinction developed by the lower courts. To ensure that third parties not suspected of any connection with the crime would receive greater protections from searches than a suspect, legislation proposed to adopt and implement a "subpoena first rule." The objective of the "subpoena first rule" was to require that the "less intrusive means" of a subpoena be utilized, unless reasonable cause was shown that a subpoena would result in the danger that the evidence would be destroyed, removed from the premises, or otherwise become unobtainable.¹³

of the Senate Comm., 95th Cong., 2d Sess. 80 (1978) (statement of Robert Lewis) (hereinafter cited as *Privacy*).

The outcry over *Stanford Daily* did not come only from journalists. Many private organizations, the most vocal of which was the American Civil Liberties Union, expressed strong concern that the Court's interpretation of the fourth amendment threatened not only the interests of the press, but also opened the door for widespread intrusions on the privacy interests of all citizens. "The *Stanford Daily* decision is but another step—perhaps the most dangerous and far-reaching—in a series of recent Supreme Court decisions weakening the privacy rights of American citizens." Taken by surprise: The Implications of *Zurcher v. Stanford Daily* for the News Media and the Public: REPORT OF THE NEW YORK STATE ASSEMBLY COMM. ON CODES 35 (1978) (testimony of Norman Dorsen, National Chairman of the ACLU).

11. *Inter alia*, Congressman Dan Quayle introduced the "Citizen Protection Act of 1979," H.R. 13017; Congressman Jacobs introduced the "Third Party Search Protection Act of 1978," H.R. 13113; Congressman Edwards introduced the "Citizen Privacy Protection Amendments," H.R. 13227; Congressman Drinan introduced the "Press Protection Act of 1978," H.R. 12952; Congressman Railsback introduced his version of the "Press Protection Act of 1978," H.R. 13232. This is only a cross section of some of the bills that were introduced. For a more extensive listing, see Note, *Zurcher v. Stanford Daily: The Legislative Debate*, 17 HARV. J. LEGIS. 152, 154 (1980) (hereinafter *The Legislative Debate*).

12. As stated by Congressman Paul N. McCloskey, the representative for the Stanford University area, who served on the Republican Task Force on the *Stanford Daily* decision, "The essence of this legislation is that no innocent person should be the subject of a search warrant." San Francisco Chronicle, August 18, 1978, § 1, at 13, Col. 2.

13. Additional views of Senator Orrin Hatch and Alan Simpson: "We are in

The application of the subpoena first policy was incorporated in two types of Bills: "Work Product" and "Third Party." The work product bills focused on shielding sources of public information dissemination (*e.g.*, authors, newspapers, and media associations). Work product legislation required that the "subpoena first rule" be employed when law enforcement officials seek to secure evidence possessed by a person believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.¹⁴ Since the work product regulation pertained specifically to public communication in or affecting interstate or foreign commerce, the congressional authority to enforce the "subpoena first rule" on state and local levels was based on Article I, Section 8, of the United States Constitution, *i.e.*, the Commerce Clause.¹⁵

Third party bills focused on shielding all innocent third parties. They did not differentiate between work product and non-work product evidence. Third party legislation required that the "subpoena first rule" be employed in all instances unless there was reasonable cause to believe that the person in control of the evidence was affiliated with the crime or that the evidence might be destroyed.¹⁶ Due to the breadth of coverage furnished by third party bills, they did not satisfy the requisite of "affecting interstate commerce" sufficiently to base congressional authority to legislate on the Commerce Clause. Therefore, third party bills relied on the congressional authority accorded by the Privileges and Immunities Clause of the fourteenth amendment, specifically, Section 5, which grants Congress the power to enforce the provi-

effect saying that, especially when communication to the public is involved, subpoenas should be used except in certain very limited circumstances." SENATE COMM. ON THE JUDICIARY, Privacy Protection Act of 1980, S. REP. NO. 874, 96th Cong., 2d Sess. 25, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 3950 [hereinafter S. REP. NO. 874].

14. President Carter announced that he would "propose legislation that would restrict police intrusion into news media offices, and would give members of the press notice and opportunity to challenge requests for the products of their reporting work." 14 WEEKLY COMP. OF PRES. DOC. 2234 (Dec. 18, 1978).

15. "When the materials sought consist of work product . . . the title applies to state, local, and federal law enforcement officers. Because disseminating information regularly affects interstate commerce, congressional authority to regulate state and local enforcement in this statute is based on the commerce clause, U.S. Const. art. I, § 8." S. REP. NO. 874, *supra* note 13, at 9, *reprinted at* 3956.

16. "[A]ttention coming out of the Stanford case has, with some justification, primarily centered on safeguarding the press. This Task Force, however, is seriously concerned over the First and Fourth Amendment implications for all citizens, not only the press." Report of the Republican Task Force on the *Stanford Daily* decision (August 17, 1978).

sion of the amendment "by appropriate legislation."¹⁷

Eventually, through the compromise of the legislative process, a bill emerged from Conference Committee which was an amalgamation of work product and third party bills. The legislation was titled "The Privacy Protection Act of 1980," and it was signed into law by President Carter on October 13, 1980.¹⁸ As applicable to state and local levels, the Privacy Protection Act of 1980 is primarily a work product bill. However, the Act also protects third parties not associated with work product through the regulation of federal law enforcement officers.¹⁹ Hesitant to base the congressional authority to legislate on state and local levels on Section 5 of the fourteenth amendment, legislators chose to word the Privacy Protection Act so that the constitutional question of congressional authority would rest solely on the Commerce Clause²⁰ and the right to regulate federal officers.²¹

Although the Privacy Protection Act does provide for the protection of third parties, exactly what third parties are to be protected is, as yet, unestablished. The Act mandates the Attorney General to develop guidelines for the protection of third parties beyond those associated with work product (*e.g.*, confidential doctor/patient and lawyer/client relationships). However, the guidelines themselves are relatively unspecific and there is no doubt their application will be largely left to the discretion of the Attor-

17. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws Section 5, The Congress shall have power to enforce, by appropriate legislation, the provisions of the article.

U.S. Const. amend. XIV.

18. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980). For further discussion *see* note 13 *supra* at 4, where it is stated that: this Act "[A]ffords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment. This legislation was prompted by *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)"

19. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 1882 (1980). "The Attorney General shall, within six months of date of enactment of this Act, 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" *Id.*

20. "The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8.

21. U.S. Const. art. I, § 8, cl. 18.

ney General.²²

In application, the Privacy Protection Act is similar to a "paint by numbers" painting. Although the diagram is complete, the outline clear, and the colors labelled; actually the final discretion of which hue to use, or perhaps whether to finish the painting at all, is up to the painter. Considering the recent change in Administrations, the Privacy Protection Act of 1980 is far from complete and full of uncertainty. This comment will review the procession of legislation in response to the *Zurcher v. Stanford Daily* decision up to the culmination of the Privacy Protection Act of 1980. Hopefully, some of the present uncertainty as to the future applications of the Privacy Protection Act can be eliminated through a thorough understanding of legislative intent.

I. BACKGROUND OF *STANFORD DAILY*

On April 7, 1971, a group of Stanford University students held an anti-war demonstration in the administrative offices of the Stanford University Hospital. Hospital administrators resorted to calling the police for help in removing the demonstrators. Although the police efforts were peaceful at first, officers finally decided to force their way through barricaded doors. As officers entered the corridors, a group of demonstrators ran to the other end of the corridor attacking and injuring nine officers. Only two of the demonstrators could be identified.

On April 11, 1971, the *Stanford Daily*, the campus newspaper, published photographs of the incident indicating that a staff photographer had been in the corridor where he could have photographed the attack on the officers. The following day, the police obtained a warrant for an "immediate search" of the *Stanford Daily's* offices for negatives, film, and pictures of the incident. The warrant was issued on the belief that photographic evidence relevant to the assaults would be found at the offices of the newspaper. The warrant affidavit did not allege that staff members of the *Stanford Daily* had been involved in any unlawful acts.

A search pursuant to this warrant was conducted later that

22. Privacy Protection Act of 1980. Pub. L. No. 96-440, 94 Stat. 1879 (1980). See also, S. REP. NO. 874, *supra* note 13, at 18, *reprinted at* 3965, where the committee states that they have

proposed and the Department [of Justice] had agreed to a legislative mandate that the Department develop guidelines which will be based on the overall philosophy of this legislation. The invasion of personal privacy resulting from an unannounced search of nonsuspect third parties requires stringent measures to limit the circumstances under which such searches can be conducted. It is the intent of the Committee that the guidelines promulgated by the Attorney General should reflect these concerns.

Id.

day.²³ The search lasted about fifteen minutes and encompassed the photo lab, filing cabinets, wastebaskets, and unlocked desks. Newspaper staff claimed that among the papers inspected were notes containing information given in confidence by informants.²⁴ Only the published photographs were found and the officers removed nothing from the office.²⁵

One month later, the *Stanford Daily* brought an action for declaratory and injunctive relief under 42 U.S.C., Section 1983,²⁶ alleging the violation of rights guaranteed by the first, fourth, and fourteenth amendments. The *Stanford Daily* argued that the police should have asked the prosecutor to issue a subpoena for the photos or should have obtained a court order that any evidence found in the paper's possession would not be destroyed.²⁷ The district court granted declaratory relief, holding that the search of the *Stanford Daily* was unreasonable because a warrant was issued without a showing of probable cause that a subpoena duces tecum would be "impractical."²⁸ The court's reasoning was that innocent third parties (those not suspected of a crime) are entitled to a greater protection under the fourth amendment than those who are suspected of criminal activity, especially when the object of the search is a newspaper or media institution.²⁹ On ap-

23. The search warrant was executed at approximately 5:45 p.m. that same day (April 12, 1971) by four members of the Palo Alto Police Department.

24. Officers claimed that they did not read or even scan the materials. 353 F. Supp. at 127.

25. *Id.* Negatives and film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the sit-in and following events were also included in the search warrant, but were not found by the officers.

26. 42 U.S.C. § 1983 (1970) reads:

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

27. The *Stanford Daily* and the members of its staff brought a civil rights action seeking declaratory and injunctive relief with respect to searches of the newspaper premises. 353 F. Supp. at 125-26.

28. *Id.* at 127.

It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise impractical, a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment.

Id.

29. *Id.* at 130. The Court believed that "in all but a few instances a subpoena duces tecum is the proper—and required—method of obtaining material from a

peal to the Ninth Circuit, the court of appeals affirmed per curiam, adopting the district court's opinion.³⁰ Again on appeal, the Supreme Court reversed by a vote of five to three.³¹

II. CRITERIA FOR PROBABLE CAUSE

The principle of the *Stanford Daily* case rests upon the Supreme Court's determination of the standard of probable cause which must be adhered to by the lower courts when considering the issuance of a search warrant.³² The Supreme Court chose to cite the accepted standard for probable cause as applicable in the *Stanford Daily* case, whereas the lower courts chose to cite a new requirement of a "subpoena first" policy for innocent third parties. The disparity between these respective rationales is the issue which Congress has chosen to act upon.³³

A. The Accepted Probable Cause Standard

In order for a search or arrest to be constitutional, the state must satisfy three basic elements.³⁴ To justify an intrusion upon an individual, the state must show probable cause to believe that:

third party." *Id.* at 130-32. The Court's reasons included the value our society places on privacy, the notion that search warrants have historically involved only those suspected of a crime, the idea that without the requirement that enforcement agencies first explore the subpoena alternative in third party situations "a third party would receive no meaningful protection against an unlawful search . . .", and finally the holding of *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971), which stated that a material witness cannot be arrested or detained unless a subpoena is impractical. The *Stanford Daily* Court felt that this analysis should be applied to third party searches as well. 353 F. Supp. at 132.

30. The court rejected appellants' arguments that one, "the issuing magistrate is the sole proper party defendant" and two, that "good faith in securing what turned out to be an invalid warrant insulates them from liability." *Stanford Daily v. Zurcher*, 550 F.2d 464, 465 (9th Cir. 1977).

31. *Id.* Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined Justice White's majority opinion.

32. *See* note 3 *supra*. The probable cause standard which the Court followed was to balance the need to search against the invasion which will result. *Camara v. Mun. Court*, 387 U.S. 523 (1967). Further, the Court defined what information is necessary to establish probable cause as: "[E]vidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed" *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

33. 436 U.S. at 549-50, 554, 560-63 (1978). The Supreme Court characterized the district court's construction of the fourth amendment as an unfounded reconstruction. *Id.* at 554: "It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment." *Id.* at 560: "[T]he reasons presented by the District Court and adopted by the Court of Appeals for arriving at its remarkable conclusion do not withstand analysis." *Id.*

34. A general probable cause standard is discussed in various cases on the subject. *See, e.g.*, *United States v. Robinson*, 414 U.S. 218 (1973) (search incident to lawful arrest); *Cooper v. California*, 386 U.S. 58 (1967) (custodial searches of impounded or seized property).

(1) a crime has been committed; (2) that specific evidence of the crime exists; and (3) that the evidence will be found in a particular location.³⁵

A division of these elements reveals the disagreement between the Supreme Court and the lower courts. The first two elements of the accepted standard can be grouped together, and, as such, they require the state to show probable cause that a piece of evidence exists before it can search. But, under the third element, once the state has probable cause to believe that such an object of evidence does exist, it must then show probable cause that an intrusion will secure that object before it can search or arrest.³⁶ The third element weighs the state's need to secure the evidence against the individual's right to privacy.³⁷ It is the balancing between the state's interest and the individual's interest upon which the courts disagree.

Justice White, writing for the majority, explained the reasoning for the standard cited by the Supreme Court in *Stanford Daily*: "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 specific 'things' to be searched for and seized are located on the property to which entry is sought."³⁸ Thus, the accepted standard treats innocent persons and suspects who are probable possessors of evidence exactly alike. Therefore, it is the state's interest in the evidence presumed to be on the person or property that governs the third element of the accepted standard. A person's lack of knowledge of the crime, or willingness to bring forward the evidence sought has no bearing on the issuance of the search warrant whatsoever.³⁹

35. These elements are derived from varying statements of separate opinions. See *Warden v. Hayden*, 387 U.S. 294, 307 (1967); *Wong Sun v. United States*, 371 U.S. 471, 479, 481 n.9 (1963); *Henry v. United States*, 361 U.S. 98, 102-03 (1959); *Carroll v. United States*, 267 U.S. 132, 161-62 (1925).

36. 371 U.S. 471, 481 n.9 (1963) (the complaint for a search warrant must particularly describe the things to be seized).

37. The state's interest in the object to be seized is determined by whether the object will assist the state in apprehending a suspect or in obtaining a conviction of a defendant at trial. *Warden v. Hayden*, 387 U.S. 294, 306 (1967).

38. 436 U.S. at 556.

39. *Id.* at 555. "[T]he State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not" *Id.*

B. *An Additional Requirement for Probable Cause*

The district court found the standard application of probable cause to innocent third parties insufficient. Therefore, the court expanded the accepted standard for probable cause by adding an additional requirement for innocent third parties, particularly newspaper and media institutions.⁴⁰ This additional requirement was termed a "subpoena first rule." The district court opinion was that a warrant shall not issue, even if it satisfies the criteria for all three of the standard elements of probable cause, unless it can be shown that the evidence can not be obtained by less intrusive means, *e.g.*, a subpoena duces tecum. The lower court stated that, "Fourth Amendment considerations compel the following rule: law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical."⁴¹ In effect, the lower court held that unless some proof can be given by sworn affidavit to explain why a subpoena should not be utilized, then it must be.

The district court analogized its decision to *Bacon v. United States*,⁴² a Ninth Circuit case involving the arrest of a material witness to a crime. In *Bacon*, the court of appeals ruled that a material witness could not be arrested without a showing of probable cause to believe that it was impracticable to obtain the witness's presence at a grand jury hearing by subpoena.⁴³ In *Stanford Daily*, the district court argued that analogous to the *Bacon* case, if one cannot be arrested unless there is probable cause to believe that a subpoena is impractical, then one cannot be searched unless there is probable cause to believe that a subpoena duces tecum is impractical.⁴⁴

In comparison, it should be noted that the district court's application of a new requirement for probable cause pertaining to non-suspect third parties does not conflict with the accepted standard of probable cause as applied to the *Stanford Daily* case. If the state's interest is solely in securing evidence, then there is no threat to the state's right if it can be shown that the evidence can

40. 353 F. Supp. at 127 (third parties entitled to greater protection particularly when first amendment interests are involved).

41. *Id.* at 132.

42. 449 F.2d 933 (9th Cir. 1971) (challenge to arrest and detention under a material witness arrest warrant).

43. *Id.* at 936. "Bacon argues that the government has no power to assure the attendance of grand jury witnesses by arrest and detention before disobedience of a subpoena." *Id.*

44. 353 F. Supp. at 129-30. The Court believed that unless there is probable cause to believe a subpoena duces tecum is impractical, a search of a third person is unreasonable per se.

be secured through the subpoena process. The lower court's analysis is simple: if there is no threat to the state's right to secure the evidence, no search is necessary, and therefore the warrant may not be authorized.

In some cases, the "subpoena first rule"⁴⁵ proposed by district court may prove to be more beneficial to law enforcement officers. The *Stanford Daily* search is a case in point. Despite the search of the newspaper office, no new photos were found.⁴⁶ However, if the enforcement officials had waited until that evening when the Grand Jury was in session,⁴⁷ a subpoena duces tecum could have been obtained, and the *Stanford Daily* would have been forced to come forward with the evidence or face the legal consequences. Since no one on the *Stanford Daily* staff was implicated, there was no incentive for the *Stanford Daily* staff to withhold the evidence. It appears that the likelihood of the evidence being obtained through a subpoena process was as good, or greater, than a search in the first place.

By shunning the lower court's additional requirement for probable cause and opting for a standard which makes no distinction between suspects and innocent parties, the Supreme Court has exposed a substantial number of citizens who may have no connection with or knowledge of the commission of a crime to the possible intrusion of a warranted search. Justice Stevens mentioned this in his dissent saying, "Countless law abiding citizens; doctors, lawyers, merchants, customers, bystanders, may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious."⁴⁸

In addition to creating a large category of individuals who are susceptible to the issuance of a search warrant, these third parties also have limited redress from an unjust search. Since the in-

45. *Id.* at 130. "[T]he court believes that in all but a few instances a subpoena duces tecum is the proper—and required—method of obtaining material from a third party." *Id.*

46. *See* note 25 *supra*.

47. 353 F. Supp. at 127. "[T]he Santa Clara County Clerk's records shows that the Santa Clara County Grand Jury—a body before which a subpoena duces tecum is returnable—met on Monday, April 12, 1971, at 7:30 p.m., two hours after the warrant executed. (Actually, the records reveal that the Grand Jury met at six o'clock P.M. to discuss administrative matters)." *Id.*

48. 436 U.S. at 579.

dividuals who possess the evidence are third parties, they have no redress through the utilization of the exclusionary rule. Third parties do not have the protection or deterrent of the exclusionary rule, because since the evidence is not to be used against them, they have no grounds for the suppression of evidence in court.⁴⁹

In addition to the inability of third parties to invoke the exclusionary rule, third parties are also susceptible to the abuse of the warrant procedure. Due to the ex parte nature of a search warrant, there is no adversarial input that a subpoena duces tecum would assure.⁵⁰ A third party has no opportunity to challenge the search warrant prior to the intrusion, whereas one can always move to quash the subpoena before producing the sought-after materials. When a warrant is employed the possibility of any effective intervention or objection by the affected citizen is nil; only ex post facto remedies are available.

Public and media response to the Court's unwillingness to accept a modified standard for third parties was immediate.⁵¹ Editorials criticizing the decision as a threat to individual privacy and freedom of the press appeared in papers across the country. In the June 2, 1978 *Los Angeles Times*, an editorial charged, "The U.S. Supreme Court has taken a narrow, crabbed, suspicious view of the First Amendment and has given exuberant, indulgent and trustful approval to a sharp extension of police power." On June 4, 1978, the *Washington Post* called for immediate remedial legislation; and on June 2, 1978, Howard K. Smith of ABC News called the decision, "the worst, most dangerous ruling the Court has made in memory."⁵² In the Statement of the Reporters Committee for Freedom of the Press, delivered by Jack C. Landau, before the Senate Committee on the Judiciary, Subcommittee on the Constitution, July 13, 1978, the *Stanford Daily* decision was accused of granting "a police power alien to our whole concept of a free society. Modification or limitations on this ruling are not enough. It must be excised from our law, root and branch."⁵³

Congressional reaction to the *Stanford Daily* decision was also

49. 353 F. Supp. at 132. "Unlike one suspected of a crime the third party has no meaningful remedy or protection against an unlawful search" *Id.*

50. 436 U.S. at 576. (Stewart, J., dissenting). "There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional protection of the newspaper has been irretrievably invaded." *Id.*

51. *Zurcher v. Stanford Daily: Hearings on H.R. 3486 and H.R. 4181 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, of the Comm. of the Judiciary, 96th Cong., 1st Sess., app. D (1979)* (summarization of statements of leading media figures and editorial reaction to *Stanford Daily* ruling) (hereinafter cited as *Stanford Daily Hearings*).

52. See *Privacy*, *supra* note 10, at 136. (testimony of Jack Landau referring to statements of Howard K. Smith).

53. *Id.* at 137.

immediate. Bills were spontaneously introduced, and hearings were held in both the House and the Senate within weeks.⁵⁴ A perusal of the remedial legislation introduced⁵⁵ conveys that the intention of *Stanford Daily* legislation was to supercede the minimum standard for probable cause cited by the Supreme Court. In effect, Congress chose to implement the "subpoena first" requirement as enunciated by the district court.

III. CONGRESSIONAL REMEDIAL LEGISLATION

When legislators decided to respond to the *Stanford Daily* decision with the introduction of remedial legislation, the content of the bills tended to focus on variations of two approaches: (1) whether the legislation should pertain only to federal agencies, or encompass state and local law enforcement officials as well;⁵⁶ and (2) whether the proposed vehicle of enforcement, the "subpoena first rule,"⁵⁷ should apply specifically to the protection of newspaper and media offices, or to all third parties.

In preparing legislation, legislators found themselves confronted with a dilemma between underinclusiveness or overbreadth. Underinclusiveness results in the denial of protection to those who justifiably deserve it. On the other hand, overbreadth places too great a restriction on law enforcement officials, which may discourage desirable investigations or, alternatively, encourage widespread evasion of the rules.⁵⁸ Legislative preferences for varying degrees of balance between underinclusiveness or overbreadth resulted in remedial legislation of two types: "Work Product" and "Third Party" Bills.⁵⁹

54. The House Subcommittee on Courts Civil Liberties, and the Administration of Justice held hearings on June 26, 1978; Subcommittee on the Constitution held hearings on June 22. See *Stanford Daily Hearings supra* note 51 and *Privacy supra* note 10 for references to bills proposed in response to the *Stanford Daily* decision.

55. For a complete listing see note 11 *supra*.

56. See *Stanford Daily Hearings, supra* note 51. See also *Privacy supra* note 10, at 137. (Statements of Jack Landau).

57. This rule is essentially equivalent to the subpoena first policy introduced by the lower courts. 353 F. Supp. 124. See also note 40 *supra*.

58. For a more elaborate discussion of this dichotomy see Note, *supra* note 11, at 165.

59. *Id.* (specific discussion of differences between the two types of legislation).

A. "Work Product" v. "Third Party" Bills

The work product bills focused on shielding sources of public information dissemination. In practical application these bills were intended to be narrow in scope and only protect persons who were affiliated with the preparation of or who participated in newsgathering activities.⁶⁰

Congressional authority to enact work product bills on a state and local level was based upon the Commerce Clause.⁶¹ The press, through its daily delivery, involves and effects interstate commerce as does radio and television with their signals crossing state lines.⁶²

Third party bills focused on shielding all innocent third parties.⁶³ They did not differentiate between work product and non-work product evidence. Third party legislation required that the "subpoena first rule" be employed in all instances. Due to the breadth of coverage furnished by third party bills, they did not satisfy the requisite of "affecting interstate commerce" sufficiently to base congressional authority to legislate on state and local levels on the Commerce Clause. Therefore, third party bills relied on the congressional authority accorded by the Privileges and Immunities Clause of the fourteenth amendment specifically, Section 5, which grants Congress the power to enforce the provisions of the amendment "by appropriate legislation."⁶⁴

Section 5 of the fourteenth amendment permits Congress to enact "appropriate legislation" to enforce protections afforded all Americans by the Bill of Rights. However, whether Congress has the authority to dictate a new requirement for probable cause, by incorporating fourth amendment rights through its ability to enforce the Due Process and Equal Protection Clauses of the fourteenth amendment, was the subject of controversial debate.⁶⁵ In

60. See note 14 *supra*. In particular note the announcement of intent to introduce legislation in response to the *Stanford Daily* decision which would restrict police intrusion into news media offices.

61. See note 20 *supra*.

62. See note 91 *infra* and accompanying text. "They amount to commercial intercourse, and such intercourse is commerce within the meaning of the constitution." *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937).

63. See, Report of the Republican Task Force on the *Stanford Daily* decision, Rep. Harold J. Sawyer, Chairman, Thurs. Aug. 17, 1978. See also note 12 *supra*.

64. See note 17 *supra*.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

65. See *Stanford Daily Hearings*, *supra* note 51, at 63.

short, for purposes of *Stanford Daily* legislation, it is the fourteenth amendment by which the Bill of Rights has been made applicable to the states that is critical.⁶⁶

Recent Supreme Court rulings on congressional authority to exercise Section 5 of the fourteenth amendment to legislate on the state and local level were fragmented and indeterminate.⁶⁷ Therefore, although the majority of the bills introduced were third party bills that applied on state and local levels, there was speculation that their constitutionality might not be accepted by the Court.

Another impediment to third party legislation was that the Carter Administration favored a work product bill.⁶⁸ Shortly following the *Stanford Daily* decision, President Carter asked Attorney General Griffin B. Bell to create a special task force within the Department of Justice to study the issue of media searches. This task force, which involved representatives from throughout the Department, was chaired by Philip B. Heymann, the head of the criminal division. The task force produced an extensive report accompanied by recommendations for legislation.⁶⁹ As part of the background research for the task force report, Philip Heymann canvassed the ninety-four United States Attorneys for their opinions concerning third party legislation.⁷⁰ Out of the seventy

Viewed in this way, section five of the fourteenth amendment, is just like all the other grants of power to Congress. It authorizes Congress to adopt statutes that Congress regards as "necessary and proper" means for protecting the rights guaranteed by the first section of that amendment . . . the bill is obviously within Congress' power to enact.

Id. (statement of Mark Tushnet).

66. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (the fourteenth amendment did not require states to lower their voting age from 21 to 18 in state elections); *Ex parte Virginia*, 100 U.S. 339 (1879) (the fourteenth amendment does not insure that a colored man must have a jury box comprised in part by colored men).

67. See, e.g., 400 U.S. 112 (five separate opinions were filed as the court ruled on four separate issues). See generally, *Stanford Daily Hearings*, *supra* note 51 and *Privacy*, *supra* note 10.

68. See note 14 *supra*. "I will soon propose legislation that would restrict police intrusion into news media offices, and would give members of the press notice and an opportunity to challenge requests for the products of their reporting work." *Id.*

69. See *Stanford Daily Hearings*, *supra* note 51, at 10. "This legislation is entitled the 'First Amendment Privacy Protection Act' because it provides broad protection against searches for materials which are obtained or prepared in connection with First Amendment activities." *Id.*

70. Virtually all U.S. Attorneys strongly agree with that aspect of the *Zurcher* decision which concerns third party searches. 'Corrective' legislation is considered unnecessary, since the U.S. Attorneys know of no empirical proof of abuse

responses received, sixty-six of the Attorneys opposed such legislation. Two felt any difficulties such legislation might create to be unknown and gave no opinion for or against. Two districts stated that they would have no problems with the legislation.⁷¹ Heeding the opinion of the U.S. Attorneys, the Justice Department perceived third party legislation as another restraint on law enforcement officials, however one which failed to cure any widespread wrong or injustice. Also, the Justice Department expressed apprehension that extending restrictions on searches to all persons not suspected of involvement in the crime under investigation might encourage criminal suspects to conceal evidence in the "sanctuaries" of third parties.⁷² This concern stemmed from the possibility that some third parties, who may or may not be involved in the crime, may be sympathetic or closely related to the criminal suspect and hence may impede the efforts of law enforcement officers to obtain necessary evidence. For the aforementioned reasons, the Justice Department chose to support a work product bill.⁷³

After consideration of the Justice Department's proposal for a work product bill, President Carter recommended H.R. 3486, the First Amendment Privacy Protection Act of 1979. The bill was introduced by Congressman Kastenmeier and referred to the Committee on the Judiciary. As introduced, the bill protected third parties from arbitrary searches only where first amendment interests are involved.⁷⁴ However, members of the Committee ques-

and view existing safeguards as adequate. New legislation is perceived as another restraint on law enforcement officials, yet one which fails to cure any widespread wrong or injustice. See *Privacy*, *supra* note 10, at 348.

71. *Id.* at 346-47. The last four United States Attorneys noted no previous use of third party warrants. The others listed four main reasons for their opposition.

A) Lack of abuse—U.S. Attorneys knew of no federal cases citing abuse of third party warrants.

B) Delay—Although the use of the warrant is infrequent there is usually one pressing and immediate reason for their request.

C) The generation of new litigation—It will add one more ground for defendants to challenge the government.

D) Loss of evidence—Notice requirements will allow more time for destruction of evidence.

72. See *Privacy*, *supra* note 10, at 344.

73. The protected category of work product materials would consist of any documentary materials created by or for an individual in connection with his or her plans to publish [This] would be subject to only two narrow exceptions. First, a search warrant would be permitted where there is an immediate danger to life or serious bodily injury. Second, a search would also be permitted where the individual is a suspect in the crime for which the evidence is sought.

Id. at 349.

74. "[I]t shall be unlawful for a government officer or employee . . . to search for or seize any work product material possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." H.R. CONF. REP. NO. 1411, 96th

tioned the underinclusiveness of the bill when every witness in favor of the legislation testified that the protections of the bill should not be limited to the press alone.⁷⁵ Committee members expressed apprehension about singling out the press for special treatment. As a result, when the subcommittee met for mark up, it was generally agreed that the legislation should be extended to apply to all innocent third parties.

Although the Committee favored legislation to protect third parties, they were confronted with the questionable constitutionality of relying on Section 5 of the fourteenth amendment to grant them the congressional authority to restrict the police powers of state and local officers. To avoid this constitutional question, the subcommittee decided to limit the applicability of the broad third party provisions of the bill to searches by federal officials only. The opinion expressed was the hope that state legislators would follow suit.⁷⁶

Senate Bill 1790 was introduced by Senator Birch Bayh as the companion bill to H.R. 3486.⁷⁷ S1790 was also a work product bill. However, third party considerations were taken into account. Similar to the House Hearings, every witness (with the exception of the Department of Justice) who testified in favor of the legislation stated that the protections of the bill should not be limited to the press.⁷⁸ Senate committee members found themselves in a situation similar to that of their colleagues in the House. They favored protecting confidential third party relationships, *e.g.*, doctor/patient, lawyer/client, but had qualms about the

Cong., 2d Sess. 1, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 3872. (hereinafter H.R. CONF. REP. NO. 1411).

75. *See Stanford Daily Hearings, supra* note 51, at 55 (statement of John Shattuck). "The Justice Department's bill is an imaginative one in that it attempts to define and protect first amendment materials. But we are very disappointed that it is as limited as it is, and pleased that the other bills referred to in my testimony . . . are broader." S. REP. NO. 874, *supra* note 13, at 8, *reprinted at* 3955.

76. *See* S. REP. NO. 874, *supra* note 13, at 9, *reprinted at* 3956. "The committee hopes that state legislatures will look toward S. 1790 as a model and draft their own legitimate responses to Stanford Daily." *Id.*

77. S. 1790, 96th Cong., 1st Sess. (1979) 126 CONG. REC. 13187 (1979).

78. *See* S. REP. NO. 874, *supra* note 13, at 8, *reprinted at* 3955.

With the exception of 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. In fact, the representatives of new organizations were among the strongest proponents of expanding the legislation to protect all innocent third parties from arbitrary search and seizure, expressing concern about singling out the press for special treatment.

Id.

constitutional ability to do so on state and local levels.⁷⁹ S1790 took two approaches for the protection of third parties. Besides applying the "subpoena first rule" to third party searches, S1790 also decreed a congressional mandate for the Attorney General to develop guidelines which "will be based on the overall philosophy of this legislation."⁸⁰ Hence, the Senate bill incorporated an attempt to provide additional third party protections at a later date.

Although H.R. 3486 and S1790 were companion bills in that they embodied congruent work product structures, the two bills failed to receive harmonious acceptance. The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text. The Senate declined to accept the House amendment and the two bills were dispatched to a Conference Committee.⁸¹

In conference, the Senate receded from its disagreement to the amendment of the House by supplanting an amendment which was a substitute for the Senate bill and House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to were several. Inter alia, the title was changed to delete the phrase "engaged in first amendment activities." This was done due to the ambiguous meaning of "first amendment activities" and the inclusion of guidelines in the bill recognizing the privacy interests of non-suspect third parties. Also, the "Documentary Materials" definition was expanded to include mechanically, magnetically, or electronically recorded cards, tapes, or disks. In addition, Attorney General guidelines were specifically enumerated and a "Date of Enactment Clause" was included. The date of enactment was to be January 1, 1981, with the provisions applicable to state and local governments to

79. See S. REP. NO. 874, *supra* note 13, at 18, *reprinted at* 3964. "As originally drafted, S. 1790 supplied such statutory protections from actions by state, local, and federal government authorities. Serious constitutional and policy questions about congressional authority to impose law enforcement procedures on the states remained unresolved, however." *Id.*

80. S. REP. NO. 874, *supra* note 13, at 18-19, *reprinted at* 3964-65.

Three standards must be incorporated into the guidelines:

- (1) a recognition of the personal privacy interest of the person possessing the materials sought;
- (2) the least intrusive means of obtaining the materials should be employed, which does not substantially jeopardize the availability or usefulness of the materials sought;
- (3) a recognition of special concern for the privacy interests represented in a known, professional confidential relationship.

81. These remarks are substantiated in the legislative histories of the following: S. 1790, 96th Cong., 2d Sess., 126 CONG. REC. 10739 (1980) (amended and passed Senate); S. 1790, 96th Cong., 2d Sess. 126 CONG. REC. 9355 (1980). (Senate agreed to conference report); H.R. 3486, 96th Cong., 2d Sess. 126 CONG. REC. 9355 (1980) (amended and passed House); H.R. 3486, 96th Cong., 2d Sess. 126 CONG. REC. 10411 (1980) (House agreed to conference report).

become effective one year after the date of enactment.⁸²

The progression of Congressional Bills H.R. 3486 and S1790 in response to the *Stanford Daily* decision was a long arduous path. Many complicated issues were involved. Also, the decisions were interrelated, with the repercussions of one decision affecting the outcome of another. For example, it is helpful to place the various alternatives for legislation on intersecting perpendicular lines. First, there are the horizontal coverage questions. What third parties should be protected—the press, or all third parties? Secondly, there are the vertical application questions. Should the legislation apply solely to federal officers, or should it apply to state and local enforcement officers as well?⁸³

Eventually, through the compromise of the legislative process, a bill emerged from the Conference Committee on H.R. 3486 and S1790. This bill was an amalgamation of work product and third party bills and was titled "The Privacy Protection Act of 1980."⁸⁴ The legislation was signed into law by President Carter on October 13, 1980.⁸⁵ On the horizontal level, the Privacy Protection Act is a "work product" bill. However, work product has been broadly defined⁸⁶ and, as such, many individuals only minimally associated with information (*e.g.*, authors) are protected. On the vertical axis, the Privacy Protection Act applies to federal, state, and local authorities, insofar as the protection of "work product" is in-

82. See H.R. CONF. REP. NO. 1411, *supra* note 74, at 5, 8, *reprinted at* 3974. A fourth standard was to be incorporated into the guidelines to be developed by the Attorney General. The fourth standard is "a requirement that an application for a warrant . . . be approved by an attorney for the government, except . . . in an emergency situation." *Id.* at 5.

83. See *Stanford Daily Hearings*, *supra* note 51, at 70. (Elaborations of this horizontal/vertical analysis by Chairman Kastenmeier).

84. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980).

85. See, 16 WEEKLY COMP. OF PRES. DOC. 2217 (Oct. 13, 1980).

86. See note 119 *infra*.

[M]aterials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of communicating a criminal offense, and

1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

2) are possessed for the purposes of communicating such materials to the public; and

3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 1881 (1980).

volved.⁸⁷ However, the Privacy Protection Act also protects third parties not associated with work product such as doctor/patient or lawyer/client relationships by obliging stringent subpoena first requirements to be placed on federal officials through mandated Attorney General guidelines.⁸⁸ In short, like many pieces of legislation, the Privacy Protection Act is a bill that has tried to appease the competing interests of effective law enforcement and individual privacy through balancing and compromise. Balancing has created a bill that is neither underinclusive or overbroad, but due to lack of specificity, it may be found that the vagueness that enables the bill to placate all parties makes the Privacy Protection Act difficult for the average police officer to understand and implement.⁸⁹

IV. THE PRIVACY PROTECTION ACT OF 1980

Before considering the actual application of the Privacy Protection Act, the first deliberation should be the constitutional foundation that the Act is based upon. From the discussion at the Congressional Hearings, it is clear that both the legislators and the Carter Administration intended the authority to be based on the Commerce Clause.⁹⁰

A. *Federal Authority to Regulate States through Commerce Clause*

A strong case can be made for congressional enactment pursuant to its commerce powers, and no strong constitutional counter-arguments exists. The press, through its daily delivery, engages in interstate commerce and affects interstate commerce, as do radio and television with their signals continually crossing state lines. Therefore, press and media organizations definitely fall

87. "[I]nsofar as such provisions are applicable to a state or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act." Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 1882 (1980).

88. *Id.* See notes 80 and 82 *supra* for the contents of these guidelines.

89. Use of the concept "work product" places an impossible burden on investigating law enforcement officials Thus, before a law enforcement official may execute any third party search warrant, this legislation in effect requires that he know the identity of the possessor of the evidence and the intent or the purpose for which the person possess the evidence. *Stanford Daily Hearings*, *supra* note 51, at 171.

90. See S. REP. NO. 874 *supra* note 13, at 9, *reprinted at* 3955. "The title applies to state, local and federal law enforcement officers. Because disseminating information regularly affects interstate commerce, congressional authority to regulate state and local enforcement in this statute is based on the commerce clause, U.S. Const. Art. I, Sec. 8." *Id.*

within the regulatory jurisdiction of the Commerce Clause.⁹¹ Periodicals and the pamphlet-leaflet press are in commerce either because they are sent across state lines by mail or other means or because they affect commerce in a variety of ways such as the purchase of goods that have passed in interstate commerce. Thus, they also may be protected through the utilization of the Commerce Clause.⁹²

The Commerce Clause received a broad, expansive reading from Chief Justice Marshall in *Gibbons v. Ogden*,⁹³ the first case considering it. The Court's interpretation was that the word "commerce" is not restricted "to traffic, to buying and selling, or the interchange of commodities." Rather, commerce is "intercourse." Commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches."⁹⁴ The commerce Justice Marshall referred to was the interaction "among" the several states.

However, the Commerce Clause was not interpreted to be without congressional boundaries.

It [the Commerce Clause] may very properly be restricted to that commerce which concerns more states than one The genius and character of the whole government seem to be, that its action is to be applied to all the . . . internal concerns [of the nation] which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.⁹⁵

91. See *Fed. Radio Comm'n v. Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266 (1932); *Associated Press v. NLRB*, 301 U.S. 103 (1936); *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 549 (1944). "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than elections and information." 322 U.S. at 549-50. 289 U.S. 266 (congressional authority to regulate interstate commerce should not be abrogated by existing arrangements which would conflict with the execution of its policy); 301 U.S. 103 (Interstate communication of a business nature, whatever the means employed, is interstate commerce subject to regulation by Congress).

92. *Scarborough v. United States* 431 U.S. 563 (1977) (the Commerce Clause will have effect where the items in question may have traveled interstate at one time or when the thing in question affects interstate commerce and there is little concern for the time at which the nexus with commerce took place).

93. 22 U.S. (9 Wheat.) 1 (1824).

94. *Id.* at 189-90. New York state had granted an exclusive right to navigate its waters to two private individuals. *Gibbons* held this to be repugnant to the Commerce Clause, since commerce, which includes all commercial intercourse between nations, and parts thereof, in all its branches, also includes navigation.

95. *Id.* at 194-95.

All forms of interstate transportation come within the Commerce Clause. Once there is a movement across a state line, the movement itself, the transactions which gave rise to it, and persons engaged in both the movement and the transaction are subject to the commerce power. Furthermore, the Court has held that the movement or transactions that cross state lines may be minuscule in proportion to the movement and transactions that occur within state boundaries and still be regulated by the Commerce Clause. For example, a newspaper published may distribute less than 1% of their daily copies across state lines and still be subject to the Commerce Clause.⁹⁶

If the requisite nexus for interstate movement has been met, the Court has also held that the congressional power to regulate, once a passage across state lines has taken place, continues for a lengthy time after the cessation of movement. In *United States v. Sullivan*,⁹⁷ the Supreme Court upheld a conviction for violation of the Federal Food, Drug and Cosmetic Act of 1938. Congressional authority to enforce the regulations of the Act upon the states was based on the Commerce Clause. The Court held in *Sullivan* that despite the fact that the drugs in question had crossed interstate lines a full six months before the infraction, Congress still had the power to regulate them through enforcement of the Food, Drug and Cosmetic Act.⁹⁸

Although the Court has given an expansive reading to the Commerce Clause in such cases as *Sullivan*, congressional authority has been restrained from application in circumstances which involve no interstate connection. In *U.S. v. Five Gambling Devices*,⁹⁹ the Court held: "No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce."¹⁰⁰

However, even though the Court has refused to allow Congress to legislate without an interstate connection, the Court has per-

96. *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946). Although approximately one-half of one percent of the publisher's daily newspaper circulation, which ranged between 9,000-11,000 copies, traveled across state lines it was still ruled as sufficient to bring him within the ambit of the commerce clause.

97. 332 U.S. 689 (1948).

98. *Id.* at 696. But the language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many interstate sales had intervened, or who had received the articles at the end of the interstate shipment.

99. 346 U.S. 441 (1953).

100. *Id.* at 446. This appears to be a strict interpretation of the Commerce Clause wherein the Court in this case refused to look beyond the assertions made by the government.

mitted Congress to regulate purely local commerce affected by an interstate connection. If, in order to effectively implement its authority to regulate commerce, Congress must regulate purely local interests, it may do so.

The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

United States v. Darby.¹⁰¹ In *Heart of Atlanta Motel Inc. v. United States*,¹⁰² the Court once again upheld congressional authority to regulate purely local interests. Upholding federal regulations including the Civil Rights Act of 1964, the Court, in *Katzbach v. McClung*,¹⁰³ said:

Much is said about a . . . business being local but 'even if appellee's activity be local and though it may be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'¹⁰⁴

The power of Congress to promote interstate commerce may base its congressional authority to enact the Privacy Protection Act on the commerce clause: 1) the right to regulate commerce associated with the transmission and dissemination of information continually across state lines; 2) the right to regulate commerce associated with the purchase of materials which continually cross state lines—even if the final product does not, e.g., production of a pamphlet or leaflet; 3) the right to regulate purely local interests if local interests threaten to affect interstate commerce.

Inasmuch as these positive grants of power do exist, it must also be noted that a recent Supreme Court case, *National League of Cities v. Usery*¹⁰⁵ can be interpreted as a restraint on congressional authority to utilize the Commerce Clause. *National League of Cities v. Usery* held that the 1974 Fair Labor Standards Act amendments, extending existing federal minimum wage and maximum hours provisions to state employers, constituted an invalid use of the Commerce Clause power since they interfered with the

101. 312 U.S. 100, 118 (1941).

102. 379 U.S. 241 (1964).

103. 379 U.S. 294 (1964) (restaurant which discriminated against blacks was barred from doing so as in violation of Commerce Clause because substantial portion of food served was transported interstate thus considered a burden on interstate commerce).

104. 379 U.S. 294, 302, citing *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

105. 426 U.S. 833 (1976).

states' right to control their governmental functions.¹⁰⁶

The decision of the Court, a five to four judgment written by Justice Rehnquist, is premised on the lack of authority delegated to Congress to regulate the employer-employee relationships of state governments and their subdivisions. Justice Rehnquist did not restrict his interpretation of congressional restraint to state employer-employee relationships. Instead, he referred to inter-governmental immunity. "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."¹⁰⁷

Considering the *Usery* emphasis on the states' sovereign immunity, the conclusion could be drawn that the Privacy Protection Act's regulation of state and local officers is an unconstitutional infringement of the states' freedom of structure integral operations in areas of traditional governmental functions. However, before this conclusion is adopted, attention should focus on the dissimilarity between the Privacy Protection Act, applicable to the states' relationship with private citizens, and the Fair Labor Standards Act¹⁰⁸ amendments which applied to the states' internal relationship with its employees. Justice Rehnquist, in *Usery*, noted this disparity between congressional authority directed at private citizens as opposed to the states' themselves. "It is one thing to recognize the authority of Congress to enact laws regulating individual business It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States."¹⁰⁹ A limitation of *Usery* to fact situations where only the internal structures and operations of state government are involved would be a legitimate application. Thus, *Usery* does not appear to endanger the constitutionality of the Privacy Protection Act.

Since *Usery*, several cases questioning the constitutionality of the Omnibus Crime and Safe Streets Act of 1968¹¹⁰ have been heard. Similar to the Privacy Protection Act, the Omnibus Act

106. *Id.* at 845. A balance was drawn between the authority of Congress to regulate such conduct, i.e. minimum wages paid, and the competing interests of the state to be free from unrestrained Federal intervention.

107. *Id.* at 852. Congress has the authority, via the Commerce Clause, to regulate state administrative activities, however for the courts to allow such regulation would be, in effect, a complete abridgement of inherent state powers. *Id.* at 845.

108. 29 U.S.C. § 201 *et seq.* (1940), *as amended* by Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 2, 88 Stat. 55 (1974).

109. 426 U.S. at 845.

110. 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42 and 47 U.S.C.).

regulations were imposed upon the states by congressional authority granted by the Commerce Clause.¹¹¹ In *Scarborough v. United States*,¹¹² the principle was whether possession of a firearm by a felon could be regulated due to the previous interstate travel of the weapon. Mr. Justice Marshall, writing for the majority, held that: the congressional intent of Title VII of the Omnibus Crime Control and Safe Streets Act was to require not more than a "minimal nexus";¹¹³ that the firearm have been, at some time, in interstate commerce, and to outlaw possession broadly, with little concern for when the nexus with commerce occurred. With the *Scarborough* decision as precedent following *Usery*, it could be argued that analogous to weapons, "work product" is within congressional authority to regulate by the Commerce Clause, because work product satisfies the same "minimal nexus," "affecting commerce," "at some time in interstate travel" that weapons do.

In *U.S. v. Culbert*,¹¹⁴ Justice Marshall, again writing for the majority, upheld a conviction under the Hobbs Act of 1976.¹¹⁵ The Court affirmed the constitutionality of the Hobbs Act, which was also based on congressional authority granted by the Commerce Clause, thereby overruling the court of appeals decision limiting the scope of application of the Act. Upholding congressional authority to regulate broadly on the state level by exercising the Commerce Clause, the court said:

Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language. We therefore decline the invitation to limit the statute's scope by reference to an undefined category of conduct termed "racketeering."¹¹⁶

Considering the Court's willingness to accept the constitutionality of federal regulation on the state level through the Hobbs Act,

111. *Id.* Wire communications are normally conducted through the use of facilities which form part of an interstate network and therefore affect interstate commerce.

112. 431 U.S. 563 (1977).

113. *Id.* at 577. Congress was greatly concerned with crimes committed with dangerous weapons, namely firearms, therefore the requirement that there be a minimal nexus with interstate commerce was adopted by the Court.

114. 435 U.S. 371 (1978).

115. 18 U.S.C. § 1951 (1979).

116. 435 U.S. at 380. The lower court limited the application of the Act not upon Commerce Clause considerations, but upon its interpretation of "racketeering." It stated that Culbert's cuts were removed from what it, the court, considered as racketeering therefore not within the scope of the Act—the Supreme Court disagreed and reversed.

it seems likely that the Court will also accept the limited state regulation of work product embodied in the Privacy Protection Act of 1980. A comparative analysis on the congressional usage of the Commerce Clause in the Omnibus Crime Control and Safe Streets Act of 1968 and the Hobbs Act of 1976 supports the conclusion that, based on precedent, the Court will uphold the federal authority to regulate the states.¹¹⁷

However, as cases such as *Usery* clearly demonstrate, although the courts will uphold the authority of Congress to regulate, there are restraints on the scope of such legislation.¹¹⁸ In the case of the Privacy Protection Act, the interpretation of the "work product" definition is of extreme importance. The clarification of the phrase "work product" will determine what the scope of congressional application of the Commerce Clause will be. If work product is interpreted to only protect the materials of the press, then there is little question of its constitutionality. But, if work product is interpreted to include authors, leafleters, etc., the constitutional power to regulate the states' conduct towards these individuals by exercising the Commerce Clause is less clear.

Before the courts may rule upon the constitutionality of the Act, they will have to interpret who and what materials the terms "work product"¹¹⁹ and "documentary materials"¹²⁰ actually protect. Certainly, for guidance in making these interpretations, the court will review congressional intent.

B. Congressional Intent

When the courts review the congressional intent of the Privacy Protections Act of 1980 they will find many sources of information.¹²¹ Since the *Stanford Daily* decision in 1970, there have been hearings in both the House and the Senate (as well as an independent task force) that have delved into the repercussions of possible remedial solutions to the *Zurcher v. Stanford Daily*

117. In *Stanford Daily*, Justice White specifically noted the permissibility of congressional legislation to place additional requirements upon search warrant procedure. "Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protection against possible abuses of the search warrant procedure." 436 U.S. at 567.

118. See note 107 *supra* and accompanying text. Congress has no power to cause a state to place its capital in a certain area within the state.

119. "Work product" is defined in the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980). Section 107(b) of the Act provides: "'Work product' . . . encompasses the materials whose very creation arises out of a purpose to convey information to the public."

120. *Id.* at § 107(a). "'Documentary materials,' . . . encompasses the variety of materials upon which information is recorded." *Id.*

121. See notes 11, 13, 16, 22, 56, 58, 63, 75, 83 and 85 *supra* for documents relevant to congressional intent.

decision.¹²² Also, there are House and Senate reports on the Privacy Protection Act,¹²³ as well as a conference report on the final bill.¹²⁴ In short, there should be sufficient chronicles available for judges to decipher the congressional intent of the legislation. Furthermore, an objective examination of congressional documents concerning *Stanford Daily* reveals that: the legislation involving the Privacy Protection Act, as well as the Act itself, supports a broad interpretation of the "work product" definitions.

The immediate reactions of legislators to the *Stanford Daily* decision was to introduce "third party bills."¹²⁵ Not until constitutional issues arose which questioned the ability of Congress to legislate on state and local levels to protect all third parties and the Justice Department supported a "work product" rather than a "third party" bill did legislators agree to accept the less inclusive scope of protection embodied in a work product bill.

Throughout the congressional hearings, speakers testified in favor of protection for all innocent third parties.¹²⁶ Although President Carter and the Justice Department preferred a work product bill, Mr. Philip Heymann, who testified at the congressional hearings on behalf of the Justice Department, said, "the bill . . . is one that broadly covers—it is a first amendment bill, not a press bill—everyone exercising his first amendment rights."¹²⁷

122. See *Stanford Daily Hearings*, *supra* note 51 and *Privacy*, *supra* note 10, and note 63 *supra*.

123. H.R. CONF. REP. NO. 1411, *supra* note 74, at 1, *reprinted at* 3972. SENATE CONF. REP. NO. 1003, 96th Cong., 2d Sess. 1 (1980). The House and Senate Reports give full explanations of the intent of the legislation. For further explanation see S. REP. NO. 874, *supra* note 13, at 25, *reprinted at* 3970-71 where the Senators voiced two concerns about the legislation: first, the final committee's departure from a mere 'subpoena first' rule with respect to a journalist's 'work product'; secondly, the bill does not contain an adequate national security exception. See also notes 15 and 75 *supra*.

124. For further evidence of intent, look to the additions and deletions made to the legislation by the conference committee. Of particular interest are the revised definitions of "documentary" and "work product" materials. See note 74 *supra*, and SENATE CONF. REP. NO. 1003, 96th Cong., 2d Sess. 1 (1980).

125. Numerous bills were introduced in the weeks following the *Stanford Daily* decision. These bills focused on first amendment considerations as well as protection of citizens from warrant searches. See generally note 11 *supra*.

126. See *Privacy*, *supra* note 51, at 4. William J. Small, Vice President, CBS Inc., testified that the need to enact legislation barring police searches of newsrooms was particularly compelling; see also S. REP. NO. 874, *supra* note 13 at 8, *reprinted at* 3955, where it was stated that Title III of the act was designed to extend protection to all innocent third parties holding documentary evidence.

127. See *Privacy*, *supra* note 51, at 19. Mr. Small also testified on the scope of the legislation. "The legislation is entitled the 'First Amendment Privacy Protec-

When Chairman Kastenmeier requested additional clarification from Mr. Heymann, the following exchange took place:

Mr. Heymann: For a communication to be covered by the bill, it would have to be at least available to anyone in the public who wanted

The appropriate test for ascertaining whether the communication in question is public or not is whether it would be available to persons in the general public upon simple request.

Mr. Kastenmeier: Is a public speech a public communication?

Mr. Heymann: A public speech would be a public communication.

Mr. Kastenmeier: I was thinking of, to test the proportion, say we're talking about a protestor in the streets

Mr. Heymann: Yes. There's no reason why a public speech under appropriate circumstances of likely impact on interstate commerce wouldn't be covered.¹²⁸

If, as Mr. Heymann testified, the Justice Department's work product definition was broad enough to encompass public speakers, then it can be presumed that the work product definition in the Privacy Protection Act is also intended to be interpreted broadly. The Privacy Protection Act was actually President Carter's recommendation for legislation,¹²⁹ and the President's legislation incorporated the findings of the Justice Department as outlined by Mr. Heymann.¹³⁰

The intention of a broad interpretation of work product was expressed by President Carter. In his statement accompanying his signing of the Privacy Protection Act, President Carter commented on his interpretation of work product. "This bill also covers others engaged in first amendment activities such as authors and scholars." In light of the written record of congressional and Presidential intent, it is undoubtable that the work product definition in the Privacy Protection Act is intended to be broadly defined. In fact, the wording of the Privacy Protection Act implicitly requires a broad interpretation of work product. Under Part B—Remedies, Exceptions, and Definitions, the definition for work product includes "work product materials, as used in this Act, . . .

tion Act' because it provides broad protections against searches for materials which are obtained or prepared in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." *Id.* at 4.

128. *Id.* at 18, 19. Mr. Heymann further testified, "the secret of its capacity to be so broad, and yet, I think, to be workable, is that it covers only documentary materials and it protects against search and seizure of only those materials which are kept for publication in interstate commerce." *Id.*

129. Chairman Kastenmeier noted during subcommittee hearings that he had not written the Privacy Protection Act, but had only introduced it. "The bill is essentially a bill written by the Justice Department, which I was pleased, along with Mr. Railsback, to introduce in their behalf and at their request. It does not represent a product of our own." *Id.* at 65.

130. See note 14 *supra*, and accompanying text. President Carter felt this legislation was, "a major step forward in protecting the integrity of freedom of the press." *Id.*

include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material."¹³¹ Indefinite terms such as "mental impressions" and "opinions" required a broad interpretation simply because they cannot be classified.

Although it is clear that the congressional intent is for a broad application of the work product definition, such an expansive definition does create several dilemmas concerning the implementation of the Act. For example, an unspecific work product definition is likely to present difficulties for the policeman on the beat or a district attorney trying to deduce exactly who is protected by "work product" and who is not. Mr. Richard J. Williams, Vice President of the National District Attorneys Association, testified in the House hearings that: "Use of the concept work product places an impossible burden on investigating law enforcement officials. Whether evidence is subject to the protections of this statute depends not so much on objective circumstances as it does upon the state of mind of the persons possessing the evidence."¹³²

Undoubtedly, law enforcement officials will receive guidance from the courts as to who is protected by the work product definition. Eventually, there will be appeals for the interpretations of the courts. These appeals will bring forth a second dilemma resulting from an expansive interpretation of work product. Roughly, the broader the work product definition is applied, the less constitutional it becomes. Since the congressional authority to enforce the Privacy Protection Act upon the states stems from the Commerce Clause, the more localized work product protections become (*e.g.*, public speakers), the more likely the enforcement of the Act upon the states will be ruled unconstitutional by the Supreme Court.¹³³ Therefore, a broad interpretation of the work

131. Privacy Protection Act of 1980, Pub. L. No. 96-440, § 107(b), 94 Stat. 1879, 1881 (1980). Work Product also includes materials used: "(1) in anticipation of communicating such materials to the public . . . prepared, produced, authored, or created, whether by the person in possession of the materials or by a person other than the person in possession of the materials; (2) . . . for purposes of communicating such materials to the public." *Id.* See notes 119-20 *supra*.

132. See *Stanford Daily Hearings*, *supra* note 51, at 171. Mr. Williams went on to state, "Thus, before a law enforcement official may execute any third party search warrant, this legislation in effect requires that he know the identity of the possessor of the evidence and the intent or purpose for which the person possesses the evidence." *Id.*

133. This assertion is made in light of the Court's decision in *Nat'l League of*

product definition may protect a wider range of third parties initially, but may eventually be overruled.

Although legislators sought to enact a broad "first amendment bill," they were not without concern for the difficulty law enforcement officials face in obtaining evidence in extenuating circumstances. To prevent the Privacy Protection Act from "hamstringing" officials, the Act includes several exceptions in which the police are not required to adhere to the "subpoena first rule."¹³⁴ Congress has chosen to differentiate between "work product" and "documentary materials" for the availability of exceptions to the "subpoena first rule."¹³⁵ For "work product" the Privacy Protection Act allows two exceptions where:

- (1) 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;
- (2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.¹³⁶

Limited to these two exceptions, work product is governed by a "no search" rule in most circumstances. There is no provision for a search warrant if a journalist threatens to conceal or destroy work product materials or if he fails to comply with a subpoena. The legislative reasoning was that a subject that either destroys evidence, or withholds information could be punished with criminal penalties or contempt.¹³⁷

Unlike work product, there is not a "no search" rule for documentary materials. The Privacy Protection Act requires the use

Cities v. Uesry, 426 U.S. 833 (1976), wherein the Court held the Commerce Clause cannot infringe on other parts of or the whole of the Constitution. States have certain rights and responsibilities which cannot be usurped by the federal government. See generally notes 105-07 *supra* and accompanying text.

134. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 1880 (1980). The purpose of this act is to limit searches for materials held by persons involved in first amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought, not to limit the ability of law enforcement officers to search for and seize materials held by those suspected of committing the crime under investigation. See S. REP. NO. 874, *supra* note 13, at 10 *reprinted at* 3956.

135. See S. REP. NO. 874, *supra* note 13, at 10, *reprinted at* 3956. "Since work product involves a creative, mental process, it was felt by the Committee that it was deserving of a higher level of protection than ordinary documentary materials." *Id.*

136. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980). The purpose of the "suspect exception" is to prevent possible abuse by law enforcement authorities. The purpose of the second exception, obviously, is to save lives. No other exceptions are provided for obtaining a search warrant for work product. See S. REP. NO. 874, *supra* note 13, at 10, 12, *reprinted at* 3956-58.

137. See S. REP. NO. 874, *supra* note 13, at 12, *reprinted at* 3958. It was the committee's belief that the creative process represented in work product is at the heart of first amendment concerns and that the proper penalty for a journalist withholding his personal creation lies with the punishment of contempt. *Id.*

of a subpoena to obtain documentary materials unless any one of four exceptions to the rule apply:

- (1) and (2) are identical to the work product exceptions;
- (3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials;
- (4) such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and—
 - (A) all appellate remedies have been exhausted; or
 - (B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.¹³⁸

A similar quandary exists for the permissibility of exceptions to that of determining what the breadth of work product coverage would be. Once again, it will be difficult for the officer or prosecutor to determine whether the evidence sought consists of work product or documentary materials.¹³⁹ Also, when a distinction has been made, the courts will still have to decide what the criteria for permitting an exception will be.¹⁴⁰

Recognizing the indiscriptiveness of definitions and exceptions, the legislators have mandated in the Privacy Protection Act that the Attorney General compile a comprehensive set of guidelines for federal officers within six months after the enactment of the Act.¹⁴¹ The mandate was specific in that it outlined categories of third parties that were intended to receive coverage. Then the detail of the composition of these categories was left to the discre-

138. See Privacy Protection Act of 1980, Pub. L. No. 96-440 § 107(b), 94 Stat. 1879, 1880. See also H. CONF. REP. NO. 1411, *supra* note 74, at 7, *reprinted at* 3971, where it is noted that documentary materials include mechanically, magnetically, or electronically recorded cards, tapes, or discs. The report further stated that files which contain reporters notes and interviews are considered to be included to the extent that such files contain protected materials.

139. See *Privacy*, *supra* note 10, at 348. Many U.S. attorneys candidly described the legislation as a gross overreaction to the concerns resulting from the Supreme Court's decision in the *Stanford Daily* case. Their greatest concern was that a legislative response to what they perceive as a "non-problem" will, in fact, create many new problems; there was a feeling that the relying on centralized control by the Attorney General are an adequate match for the real concerns. *Id.*

140. This may force the Court into judging interpersonal relationships. E.g., tier between family members may become an issue.

141. Privacy Protection Act of 1980, Pub. L. No. 96-440 § 107(b), 94 Stat. 1879, 1882. The House amendment included Attorney General guidelines in a slightly different form from the Senate bill. The differences in the House amendment included the fuller explanation of privacy interests in § 201 and a requirement that a U.S. Attorney approve an application for a warrant in most cases. See H. CONF. REP. NO. 1411, *supra* note 74, at 8, *reprinted at* 3972.

tion of the Attorney General. The enumerated mandate in the Privacy Protection is:

- (1) a recognition of the personal privacy interest of the person in possession of such documentary materials;
- (2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained;
- (3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner, lawyer and client, or doctors and patient;
- (4) a requirement that an application for a warrant to conduct a search governed by this title be approved by an attorney for the government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within 24 hours of such emergency the appropriate United States Attorney is notified.¹⁴²

Furthermore, the Attorney General is required to "collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and House of Representatives on the use of search warrants by Federal officers and employees for documentary materials."¹⁴³

With regard to the inclusion of confidential relationships, the intent of Congress to broadly protect confidential relationships has been documented in the Conference Report, Joint Explanatory Statement of the Committee of Conference.

The reference to these three relationships [lawyer/client, doctor/patient, clergyman/parishioner] in the statute is not intended to be an exclusive reference. Other important confidential relationships such as exist between psychologist and client, psychiatrist, social worker and client and psychiatric nurse and client shall be recognized. Further, it is the intent of Congress that the phrase "doctor/patient" be construed broadly to include all doctorlike therapeutic relationships.¹⁴⁴

In summary, although there may be some debatable constitu-

142. See H. CONF. REP. NO. 1411, *supra* note 74, at 8, *reprinted at* 3972. The principal exception which would allow the use of a search warrant as opposed to a request or a subpoena is where there is sufficient reason to believe that the documentary materials sought would be destroyed if a subpoena were to be issued, or when immediate seizure of the materials is required to prevent substantial reduction in their usefulness. *Id.*

143. *Id.* See also Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 1882 (1980). This section also provides that non-compliance with the guidelines would not be litigable, and the evidence obtained through a violation would not be subject to the exclusionary rule, and that the federal courts would be without jurisdiction over any claim based solely on a failure to follow such guidelines. *Id.* at 1883.

144. See H. CONF. REP. NO. 1411, *supra* note 74, at 9, *reprinted at* 3972. "Testimony on Standard [sic] Daily legislation before the committee convinced the members of the extreme sensitivity of the relationship, for example, between a psychiatrist and his or her patient, and the harm which can be done by an intrusive governmental seizure of confidential information, and police rummaging through confidential files." *Id.*

tional ramifications, the congressional intent clearly was to restrict a wide variety of third party searches through the Privacy Protection Act of 1980.

CONCLUSION

As the description of the progression of legislation throughout this comment recounts, there has been a long arduous procession which has finally concluded with the Privacy Protection Act of 1980, a process spanning a decade.¹⁴⁵ But the controversy, response, testimony, and remedies stemming from the *Zurcher v. Stanford Daily* decision are far from finished.

The Privacy Protection Act does currently protect some elements of "work product" and "documentary materials," but who is actually protected is still relatively unclear. Legislators have carefully documented their intent to broadly protect innocent third parties by the "work product" definition. And, although constitutional issues do arise, a strong argument can be made for congressional authority to regulate the states through the Commerce Clause.

Although the intent for the implementation of the Act is relatively clear, the recent change in Administration leaves questions as to whether this intent will be accepted and followed.¹⁴⁶ Like a painting left unfinished by the original artist, the Privacy Protection Act is far from complete. With a new artist now at the easel, the press, the media, and any potential third party, must await the finishing strokes.

J. KIRK BOYD*

145. The initial search of the Daily office took place on April 12, 1971.

146. Attorney General Griffin B. Bell had responsibility for much of the development of remedial legislation to the *Stanford Daily* decision. He has since been succeeded by Attorney General William French Smith.

* Author is a graduate student at the University of Santa Barbara.

