Protecting The Press From Stanford Daily: A Federal Newsman'S Work Product Privilege From Search And Seizure

PROTECTING THE PRESS FROM *STANFORD DAILY*: A FEDERAL NEWSMAN'S WORK PRODUCT PRIVILEGE FROM SEARCH AND SEIZURE

In May 1978, the Supreme Court in *Zurcher v. Stanford Daily*[1] dealt a major blow to newsmen seeking recognition of special protections under the first amendment to the United States Constitution.[2] In upholding the seizure of photographs from the files of a newspaper office, the Court determined that no more than an application of the fourth amendment's probable cause requirement[3] with "particular exactitude" is necessary

[1] 436 U.S. 547 (1978). In *Stanford Daily,* the Supreme Court addressed for the first time the issue of special protection for newsmen under the first amendment to the United States Constitution when presented with a good faith request for documentary evidence. *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972) (Supreme Court first faces and denies claim for newsman's testimonial privilege under first amendment). For a discussion of *Branzburg,* see text accompanying notes 21-31 *infra.* The district court opinion in *Stanford Daily,* Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd,* 550 F.2d 464 (9th Cir. 1977), *rev'd,* 436 U.S. 547 (1978), held that a subpoena *duces tecum* should be used in place of a search warrant in all but rare circumstances. 353 F. Supp. at 130; *see* text accompanying notes 40-51 *infra.* This lower court opinion had received considerable praise from several sources maintaining that newsmen are entitled to special protection because of the first amendment interests involved. *See, e.g.,* State v. Klinker, 85 Wash.2d 509, 537 P.2d 268 (1975); Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis,* 28 STAN. L. REV. 957 (1976) [hereinafter cited as *Search and Seizure of the Media*]; Comment, *The Theory of Probable Cause and Searches of Innocent Persons: The Fourth Amendment and* Stanford Daily, 25 U.C.L.A. L. REV. 1445 (1978) [hereinafter cited as *Theory of Probable Cause*]. *But see* United States v. Manufacturer's Nat'l Bank, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied sub nom.* Wingate v. United States, 429 U.S. 1039 (1977); State v. Tunnel Citgo Serv. & Deluxe Oil Co., 149 N.J. Super. 427, 433, 374 A.2d 32, 35 (1977).

[2] The first amendment states in part, "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." U.S. CONST. amend. I. The first amendment is applicable to the states through the fourteenth amendment. Schneider v. State, 308 U.S. 147, 160 (1939). Newsmen argued in *Stanford Daily* that this language gave them greater protection from search and seizure than that afforded under the fourth amendment. 436 U.S. at 563; *see* note 3 *infra.*

[3] The fourth amendment provides:

> 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. The fourth amendment is applicable to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). A leading case interpreting the fourth amendment is Warden v. Hayden, 387 U.S. 294 (1967), in which the Supreme Court rejected the "mere evidence" rule which had limited searches and seizures to items of contraband, fruits or instrumentalities of crime, or weapons with which a criminal could escape. *Id.* at 306-07. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court redefined the scope of the fourth amendment's protections, concluding that the object of the amendment's protection is people, not areas of property. *Id.* at 353. According to the *Katz* Court, fourth amendment protection is afforded where there is a "reasonable expectation of privacy," coining a phrase from Justice Harlan's concurring opinion. *Id.* at 360 (Harlan, J., concurring). The reasonable expectation of privacy benchmark has been ridiculed on the basis

where first amendment interests would be endangered by a search.[4] *Stanford Daily* is in accord with *Branzburg v. Hayes*,[5] decided six years earlier, in which the Supreme Court denied the existence of a testimonial privilege under the first amendment for newsmen subpoenaed in good faith by a grand jury.[6] The *Branzburg* decision marked the beginning of the current flurry of activity concerning the establishment of a newsman's privilege.[7] Newsmen heeded the advice of the *Branzburg* Court to look to the legislatures for a newsman's privilege[8] and were successful in substantially increasing the list of states with newsman shield laws.[9] Efforts to

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that if this formula constitutes the trigger to fourth amendment protections, the government need only make periodic announcements identifying areas where no privacy exists. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) [hereinafter cited as Amsterdam]. Since the Framers of the Constitution certainly desired more protection than these governmental announcements would provide, *Katz* cannot be rationally interpreted as all-inclusive, but merely as identifying one area of fourth amendment protection. *Id.* at 385.

[4] 436 U.S. at 565.

[5] 408 U.S. 665 (1972).

[6] *Id.* at 690, 708. The Supreme Court noted that the only testimonial privilege rooted in the Constitution is the fifth amendment privilege against compelled self-incrimination. *Id.* at 689-90.

[7] *See* Eckhardt & McKey, Caldero v. Tribune Publishing Co.: *Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources*, 14 IDAHO L. REV. 21, 62 (1977) [hereinafter cited as Eckhardt & McKey]. Prior to the *Branzburg* decision, regulations promulgated by the United States Department of Justice also served to attract attention to the plight of the newsman as he attempted to preserve his confidential sources of information. The *Branzburg* Court cited the Guidelines for Subpoenas to the News Media, announced by then Attorney General John Mitchell on August 10, 1970, as a possible solution to the overburdening of newsmen with subpoenas. 408 U.S. at 707; *see* text accompanying notes 18 & 19 *infra*. The guidelines, currently codified at 28 C.F.R. § 50.10 (1978), call for federal employees to use alternative means from subpoenas if possible to obtain information from the news media, negotiations with the media, and as a last resort, issuance of a subpoena under a balancing test "between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." *Id.; see Search and Seizure of the Media, supra* note 1, at 960 n.20; Eckhardt & McKey, *supra*, at 62, 62 n.265. Under these regulations, a subpoena may issue only after a breakdown in negotiations with the press and under the express authorization of the Attorney General. 28 C.F.R. § 50.10(d) (1978). Administrative reprimand or other "appropriate" disciplinary action may be imposed if the subpoena is issued absent the prior approval of the Attorney General. *Id.* § 50.10(k). Failure to adhere to Justice Department guidelines, however, has been held no defense to a subpoena. *See In re* Horn, 458 F.2d 468, 473 (3d Cir. 1972); *cf. In re* Lewis, 384 F. Supp. 133, 137 (C.D. Cal. 1974), *aff'd sub nom.* Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (government has no burden to show its adherence to the guidelines).

[8] In *Branzburg*, the Supreme Court explicitly advised the newsmen to capitalize on the power of Congress and state legislatures to construct a newsman's privilege. 408 U.S. at 706. Additionally, the *Stanford Daily* Court noted the power of legislatures to "establish nonconstitutional protections" for newsmen. 436 U.S. at 567.

[9] Twenty-six states have enacted newsman shield laws. Note, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 167 n.41 (1976) [hereinafter cited as *Newsman's Privilege After Branzburg*]; *see* note 32 *infra*. The *Stanford*

secure the passage of federal legislation, however, have proven unsuccessful.[10] Nevertheless, in response to the *Stanford Daily* decision, the executive branch has introduced a comprehensive proposal essentially barring searches and seizures of a newsman's "work product"[11] documentary materials.[12] In addition, while allowing for the continued use of subpoenas *duces tecum* to secure these work product materials, the proposed legislation creates a statutory preference for the employment of subpoenas *duces tecum* to collect non-work product materials from newsmen.[13]

Until the late 1960's, newsmen and prosecutors had maintained a "negotiation and accommodation" posture with mutual respect for the importance of each other's activities.[14] The Supreme Court previously had proscribed search warrants employed as prior restraints on the press[15] and a compulsory disclosure of associational ties where such inquiry was not germane to a criminal investigation.[16] In addition, the Court had barred

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Daily decision probably will encourage more states to enact shield laws. 3 SUFFOLK L. REV. 150, 159-60 (1979).

[10] Six bills in the 92d Congress and sixty-six bills in the 93d Congress were drafted in an unsuccessfull attempt to legislate a federal newsman's privilege. Note, *Reporter's Privilege—Guardian of the People's Right to Know?*, 11 NEW ENG. L. REV. 405, 415-16 (1976) [hereinafter cited as *Reporter's Privilege*]. Senator Sam Ervin, Jr. explained that the failure of the 93d Congress to write a newsman's privilege stemmed from a split among newsmen concerning the type of privilege required and among legislators over the type of a privilege which could obtain the requisite support to pass Congress. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 260-78 (1974) [hereinafter cited as Ervin].

[11] *See* text accompanying notes 84-85 *infra.*

[12] *See* text accompanying notes 75-109 *infra.* Although ridiculing the judicial reasoning supporting *Stanford Daily* and other recent anti-press Supreme Court decisions, *e.g.*, Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978), newsmen generally are wary of "protective" legislation. A recent essay by *Time* magazine's editor-in-chief set forth newsmen's thoughts:

> No serious journalist questions the need to balance the rights of a free press against other rights in society, including the rights of defendants. But the degree of balance is what counts, and the balance is tilting against the press. As a result, a backlash against the courts has begun in Congress, with the introduction of many bills designed to shore up the rights of journalists. That is a mixed blessing. Spelling out rights that were assumed to exist under the general protection of the First Amendment may very well result in limiting those rights. Most of the press would much rather not run to Congress for protection against the courts. Yet if the courts continue on their present course, journalists will have little alternative.

Grunwald, Henry A., "Time Essay," *Time* (July 16, 1979) at 75. Thirteen other bills have been proposed in Congress in response to *Stanford Daily. See* Comment, *A Procedural Standard of Reasonableness for Searches of Nonsuspect Third Parties*, 64 IOWA L. REV. 367, 383-84 (1979) [hereinafter cited as *A Procedural Standard of Reasonableness*].

[13] *See* text accompanying notes 93 & 94 *infra.*

[14] Ervin, *supra* note 10, at 242.

[15] *See, e.g.*, A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961). This line of cases prohibits seizures directed at suppressing circulation of news materials rather than collecting evidence.

[16] *See, e.g.*, De Gregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

governmental conduct which had a "chilling effect" on the exercise of first amendment rights.[17] During the 1960's, however, newsmen in the new situation of investigating anti-war demonstrations, the civil rights movement, and the drug-oriented counterculture, often acted as the only trusted link between those groups and the inquisitive public.[18] As a result, prosecutors increasingly relied on press subpoenas to uncover incriminating information concerning confidential sources in these anti-establishment groups.[19] Not until 1972, however, did the Supreme Court directly consider whether the protection afforded by the first amendment allowed newsmen to refuse to testify before a grand jury pursuant to a subpoena *ad testificandum.*[20]

In *Branzburg v. Hayes,*[21] the Supreme Court heard a trio of cases which involved the issuance of grand jury subpoenas to reporters investigating the Black Panther Party and illegal drug use.[22] The newsmen, in claiming a privilege not to testify, asserted that to gather news they necessarily often must agree to withhold the source of information published or print only a part of the facts revealed. Furthermore, the newsmen argued that if a reporter is forced to disclose his confidential sources to a grand jury, his confidential sources will be significantly deterred from offering publishable information in the future. Consequently, the free flow of information protected by the first amendment would be abridged.[23] In support of their assertion, the newsmen relied on several cases which held that any infringement of rights protected by the first amendment must be as limited

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In these cases, the Supreme Court acted to protect associational privacy from governmental action which was not strictly investigative.

[17] *See, e.g.,* Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964). Although the questioned action does not constitute a direct prohibition on the exercise of first amendment rights, these cases indicate that the Supreme Court will restrict the action if the effect of the action would result in the deterrence of first amendment activity.

[18] Ervin, *supra* note 10, at 243-44. *See generally* Note, *Newsperson's Privilege in California: The Controversy and Resolution,* 29 HASTINGS L.J. 375, 376 (1977) [hereinafter cited as *Newsperson's Privilege in California*].

[19] Ervin, *supra* note 10, at 245.

[20] *See* Branzburg v. Hayes, 408 U.S. 665 (1972). Although lower courts earlier had refused the claim of an absolute newsman's privilege both at common law, *see, e.g.,* Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), and under the first amendment, *see, e.g.,* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958), the Supreme Court consistently declined to address the newsman's privilege issue until *Branzburg. See* Ervin, *supra* note 10, at 241; *Newsperson's Privilege in California, supra* note 18, at 379; *see, e.g.,* State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S. 905 (1968).

[21] 408 U.S. 665 (1972).

[22] The *Branzburg* Court reviewed the petitions of three newsmen. Branzburg was subpoenaed after authoring a comprehensive survey of illicit drug activities in Frankfurt, Kentucky. The survey revealed that Branzburg had witnessed the illegal use of marijuana during a two week stay with drug-users. *Id.* at 667-68. A grand jury subpoenaed Pappas, a television newsman, after he spent three hours inside a Black Panther Party headquarters awaiting a police raid. *Id.* at 672-73. Caldwell was a newsman who also had established strong working ties with the Black Panther Party. *Id.* at 675.

[23] *Id.* at 679-80.

as possible while still allowing the government to achieve its necessary purpose.[24] This argument, however, was rejected by the Supreme Court, which held that newsmen have no first amendment privilege to refuse to answer relevant and material questions asked pursuant to a good faith grand jury investigation.[25] Since the "investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen," the Court concluded that a grand jury investigation is of paramount interest.[26] The Supreme Court thus denied newsmen a testimonial privilege before grand juries and reasoned that if a newsman's sources of informaton are "as sensitive as they are claimed to be," a conditional privilege would be of little benefit to a newsman.[27] Additionally, the Supreme Court noted that every incidental burdening of the press does not violate the first amendment.[28]

Since Justice White's majority opinion in *Branzburg* received the support of only three other Court members, Justice Powell's short concurring opinion attracted considerable attention. In the concurrence, Powell outlined a case-by-case balancing test to be employed between the freedom of the press and the necessity of the newsman's testimony when a newsman asserts that a grand jury investigation is being conducted in bad faith.[29]

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[24] *Id.* at 680-81; *see, e.g., In re* Stolar, 401 U.S. 23 (1971); United States v. O'Brien, 391 U.S. 367 (1968).

[25] 408 U.S. at 690, 708; *see* text accompanying note 30 *infra.* For an extensive list of commentaries on *Branzburg,* see *Reporter's Privilege, supra* note 10, at 414 nn.47 & 48. Before *Branzburg,* most courts relied on Judge (later Justice) Stewart's opinion in Garland v. Torre, 259 F.2d 545, 549-50 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958), a civil case which granted a qualified newsman's privilege protecting against compelled disclosure of information not going "to the heart of the plaintiff claim." Some courts, led by the Second Circuit's holding in Baker v. F&F Inv. Co., 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied,* 409 U.S. 966 (1973), have distinguished *Branzburg* on the basis of the civil-criminal distinction and followed *Garland. See, e.g.,* Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976); Zerilli v. Bell, 458 F. Supp. 26 (D. D.C. 1978); Gulliver's Periodicals, Ltd., v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976). *But see* Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, *cert. denied,* 434 U.S. 930 (1977).

[26] Branzburg v. Hayes, 408 U.S. at 700.

[27] *Id.* at 702. The Supreme Court also noted the difficult burden the judiciary would encounter in implementing a conditional privilege. *Id.* at 703-06. In distinguishing between the value of enforcing different criminal laws in deciding whether to impose a newsman's privilege, the Court decided that judges in essence would be making legislative decisions. *Id.* at 705-06.

[28] Branzburg v. Hayes, 408 U.S. at 682.

[29] *Id.* at 710 (Powell, J., concurring). An investigation being conducted in bad faith could be evidenced by a request for information which bears " only a remote and tenuous relationship to the subject of the investigation" or is "without a legitimate need of law enforcement." *Id.* In such a situation, the competing values of the free press and the societal interest in prosecuting crime would be balanced by Powell on a motion to quash. *See* note 151 *infra;* text accompanying notes 64-66 *infra* (Powell's explanatory concurrence in *Stanford Daily*). As noted recently, "[T]he journalist may be *required to testify in any and all good faith criminal investigations* - there is no case-by-case consideration given to a claim of privilege. *Good faith investigation interests always override a journalist's interest in protecting his*

Several commentators and a few courts, searching for a way to limit the impact of the denial of the newsman's privilege in *Branzburg*, contended that Powell's pivotal concurrence interpreted the majority opinion to require a balancing test in all cases to determine a newsman's privilege.[30] Consequently, although Powell's concurrence was used to keep the issue of a newsman's privilege alive in federal courts, the force of the newsmen's arguments was greatly diminished.[31]

Numerous state legislatures, in attempting a political solution in this area, responded to *Branzburg* by enacting newsman shield laws.[32] State shield laws provide uncertain protection for transient newsmen, however, because they are limited to the jurisdiction of the state, and only slightly over half the states have enacted shield laws.[33] Additionally, in federal courts, state shield laws are binding only in civil proceedings in which state law provides the rule of decision.[34] In determining the question of privilege in a federal question case, however, Federal Rule of Evidence 501 requires only that federal courts interpret the principles of common law "in the

source." Reporters Comm. for Freedom of the Press v. American Tel. & Tel., 593 F.2d 1030, 1049 (D.C. Cir. 1978), *cert. denied,* 99 S. Ct. 1431 (1979) (emphasis in original); *see In re* Possible Violations of 18 U.S.C. 371, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977). Consequently, the court in United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd mem.,* 559 F.2d 1206 (2d Cir.), *cert. denied,* 434 U.S. 997 (1977) quashed a subpoena *duces tecum* in a criminal action only after determining that, in addition to conflicting with the newsman's first amendment interests, the grand jury sought materials irrelevant and immaterial to the subject of the investigation. 424 F. Supp. at 232.

[30] *See, e.g.,* Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. denied,* 417 U.S. 938 (1974); Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen,* 26 HASTINGS L.J. 709, 741 (1975); *Search and Seizure of the Media, supra* note 1, at 976 n.110. *See generally In re* Farber, 78 N.J. 259, 299-300, 394 A.2d 330, 350 (1978) (Handler, J., dissenting). *But see* note 29 *supra.*

[31] One commentator has noted that every case since *Branzburg* has recognized that the rights of criminal defendants need to be balanced in some way against a newsman's first amendment rights. Eckhardt & McKey, *supra* note 7, at 97.

[32] *See* text accompanying note 9 *supra.* State shield laws typically protect a newsman from compulsory testimony concerning a source of information. In addition, some shield laws extend protection to the information itself. Almost half of the shield laws only afford newsmen protection under a balancing test or deny it completely in libel cases. *See Search and Seizure of the Media, supra* note 1, at 960-61. For an extensive analysis of state shield laws, see *Reporter's Privilege, supra* note 10, at 427-57.

[33] *Newsperson's Privilege in California, supra* note 18, at 404; *see* note 10 *supra.* In *Branzburg,* New York and Massachusetts shield laws would have been inapplicable to Caldwell, a New York Times reporter working in California, or Pappas, a Massachusetts television newsman assigned to Providence, Rhode Island because of their limitation to the jurisdiction of the newsman's state. *See* 408 U.S. at 672, 675.

[34] FED. R. EVID. 501; *see* Lewis v. United States, 517 F.2d 236, 237 n.2 (9th Cir. 1975). In federal court, state shield laws apply only in federal diversity jurisdiction cases under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See Search and Seizure of the Media, supra* note 1, at 967. Consequently, federal courts situated in states with a shield law may refuse a reporter's privilege in a non-diversity case.

light of reason and experience."[35] Although the chief draftsman of the federal rules stated that the purpose of Rule 501 was to allow the development of a newsman's privilege on a case-by-case basis,[36] federal courts have rejected the opportunity to create a newsman's privilege by limiting their consideration to existing federal common law, which contains no such privilege.[37]

The applicability of state shield laws to search and seizure of a newsman's journalistic materials is uncertain.[38] Assuming that the testimonial shield laws are applicable to searches of a news office, the utility of such laws to newsmen is minimal. Faced with a search warrant, the newsman may either forcefully resist or relent and seek remedial litigation.[39] In *Zurcher v. Stanford Daily*,[40] police searched the office of the Stanford University newspaper. The search was conducted pursuant to a search warrant issued upon a finding of probable cause that the newspaper possessed photographs revealing the identities of demonstrators who had assaulted a policeman at the school hospital.[41] Although the search was completed without incident, the newspaper filed suit in federal court, alleging that the materials sought should have been obtained through the use of a subpoena *duces tecum* due to the first amendment interests involved.[42] Seeking declaratory and injunctive relief, the *Stanford Daily* alleged that the use of the more intrusive search warrant violated the first, fourth, and fourteenth amendments.[43]

The district court agreed with the newspaper, concluding that third party searches[44] represent a dangerous threat to the ability of newsmen to

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[35] FED. R. EVID. 501.

[36] 120 CONG. REC. H12,254 (daily ed. Dec. 18, 1974) (remarks of Rep. Hungate).

[37] *See, e.g.*, Lewis v. United States, 517 F.2d 236, 237 (9th Cir. 1975). *See also Newsperson's Privilege in California, supra* note 18. By limiting their review to federal common law, federal courts restrict any initiative in creating a newsman's privilege to the holding of *Branzburg*. *See* text accompanying note 25 *supra*.

[38] No court has directly applied a state shield law to a search of a press office. *See Search and Seizure of the Media, supra* note 1, at 961 n.28. Additionally, no authority exists suggesting the applicability of these testimonial privileges to search and seizure. In *In re* Farber, 78 N.J. 259, 394 A.2d 331 (1978), the court concluded that *Branzburg* "squarely" applied to a subpoena *duces tecum*, and further determined that New Jersey's shield law is restricted by *Branzburg*. *Id.* at 340-41; *see* N.J. STAT. ANN. § 2A: 84A-21 (1978) (News Media Privilege Act).

[39] *Search and Seizure of the Media, supra* note 1, at 969; *see* 47 U. CINN. L. REV. 624, 631-32 (1978).

[40] 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978).

[41] 353 F. Supp. at 126. The police had no indication of and found no proof that any member of the *Stanford Daily* newspaper was involved in the assault. *Id.*

[42] *Id.* at 127-28; *see* text accompanying notes 130-52 *infra*.

[43] 353 F. Supp. at 125-26. The *Stanford Daily* newspaper brought its action under 42 U.S.C. § 1983 (1976). *Id.* at 125.

[44] A third party search is one in which neither the owner of, nor anyone on, the premises is suspected of criminal activity. *See Search and Seizure of the Media, supra* note 1, at 972; note 49 *infra*.

gather and disseminate information to the public.[45] The court stressed that when "less drastic means"[46] exist to obtain the same information, a subpoena *duces tecum* should be required in all but rare circumstances.[47] In support of its holding, the district court noted that search warrants historically involved only those persons implicated in criminal activity.[48] Since the protection of the exclusionary rule[49] is inapplicable to third parties,

[45] 353 F. Supp. at 136. The district court granted declaratory relief, but refused injunctive relief because there was no indication that the police would conduct similar searches of the newspaper office in the future. *Id.*

[46] The "less drastic means" doctrine, although predominantly applied in first amendment cases, originated in cases interpreting the commerce clause. 86 HARV. L. REV. 1317, 1322 n.30 (1973); *see, e.g.,* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). Under the less drastic means doctrine as applied to the first amendment, the government must choose the course of action which least interferes with the liberties guaranteed under the first amendment when alternatives of equal effectiveness are available. Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464, 464 (1969) [hereinafter cited as *Less Drastic Means*]. The test has been termed illusory because the Supreme Court does not and cannot competently weigh all of the available alternatives in terms of cost and effectiveness and, as a result, limits its inquiry to traditional methods of resolution. *See id.* at 471-74; Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (unwanted leaflets delivered to home sufficiently controlled by traditional homeowner's right to refuse strangers as visitors). Arguably, the Court's reluctance to abide by the less drastic means test results from either a fear of formulating advisory opinions, *Less Drastic Means, supra,* at 471, or a reluctance to engage in an apparently legislative task. 86 HARV. L. REV. 1317, 1322 (1973).

[47] 353 F. Supp. at 135. Under the district court's test, "rare circumstances" warranting the use of a search warrant would exist when there is a "*clear showing*" that the destruction or movement out of the jurisdiction of the court of important materials cannot be prevented by a restraining order. *Id.* The district court's less drastic means argument was based upon its finding that a subpoena *duces tecum* is "obviously" less intrusive than a search warrant. *See id.* at 130. In support of this finding, the court evaluated the relative impact of the alternatives on the news gathering activities of the press. *Id.* at 134. Search warrants, explained the court, allow police to rummage through the news office, rendering all confidential materials vulnerable to disclosure. *Id.* at 134-35. Such an extensive operation disrupts the activities of the news office, inhibiting the actual physical production of the newspaper. *Id.* at 135. The ex parte issuance of a search warrant deprives a newsman of the judicial control recognized as essential in *Branzburg. Id.; see* note 111 *infra.* The use of search warrants also may jeopardize a newspaper's credibility and risk self-censorship. 353 F. Supp. at 135. In contrast, the court determined that a subpoena *duces tecum* causes no intrusion into the working offices of a newspaper and gives newsmen the opportunity to challenge its issuance in court by filing a motion to quash. *Id.* at 130. In comparison to the district court's analysis, see text accompanying notes 52-63 *infra* for the Supreme Court's reasoning in reversing.

[48] 353 F. Supp. at 131; *see* note 3 *supra.*

[49] The exclusionary rule prohibits the admission into evidence of materials seized in violation of the fourth amendment in federal and state criminal and "quasi-criminal" trials. *See* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* C. MCCORMICK, EVIDENCE §§ 165-68 (2d ed. 1972) [hereinafter cited as MCCORMICK]. The district court argued that the inapplicability of the exclusionary rule to third parties, *see* Alderman v. United States, 394 U.S. 165 (1969), gives criminal suspects more protection against unreasonable searches than innocent parties. 353 F. Supp. at 131. A subpoena-first rule, submitted the court, would tend to adjust this balance through hearings on a motion to quash which provide at least some comparable protection for a third party newsman. *Id.* at 133; *see* note 139 *infra.*

such persons are generally provided inadequate protection from unreasonable searches.[50] The *Stanford Daily* district court also accepted the plaintiff's assertion of support by analogy to a recent case holding that an arrest warrant is improper unless there is probable cause to believe that a witness's presence cannot be secured by a subpoena *ad testificandum*.[51]

Although the district court's holding was accepted by both commentators and courts,[52] the Supreme Court reversed, finding sufficient protection for newsmen under the fourth amendment.[53] Central to the Supreme Court's reasoning was its conclusion that the identity of the person being searched is largely irrelevant because the "critical element" in a search is the reasonable belief that the specific thing searched for is on the property to which entry is sought.[54] In contrast to the newsmen's first amendment argument that their confidential sources deserved protection from disclosure,[55] the Court emphasized fourth amendment protections[56] in finding that the use of a subpoena *duces tecum* offers no net gain in privacy over the issuance of a search warrant.[57] The Supreme Court determined that

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[50] 353 F. Supp. at 131.

[51] *Id.* at 132. The *Stanford Daily* newspaper relied on the holding of Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971), in which the court construed a factual situation involving an arrest warrant issued for a material witness. 353 F. Supp. at 132; *see* FED. R. CRIM. P. 46(b) (compelled attendance of witnesses in criminal trials). At least one commentator has questioned the validity of the *Stanford Daily* district court's analogy, contending that subpoenas issued for witnesses represent different considerations than those issued to produce documents. *See* 86 HARV. L. REV. 1317, 1320-21 (1973).

[52] *See* note 1 *supra.*

[53] Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978); *see* note 3 *supra.*

[54] 436 U.S. at 556; *see* note 56 *infra.*

[55] *See* text accompanying notes 42-47 *supra.*

[56] Since the Supreme Court's decision in *Stanford Daily* relied on a fourth amendment analysis, the case can be critiqued from a fourth amendment perspective. *See Theory of Probable Cause, supra* note 1, at 1463 n.53. In *Stanford Daily,* the Supreme Court reaffirmed its faith in the cost-benefit theory of evaluating particular governmental actions, an analysis which allows searches of innocent persons on the same probable cause required for the search of a suspect. *See id.* at 1493. The Court noted that two of its previous decisions held that even a less stringent standard of probable cause is acceptable in cases where the search is not being conducted to secure criminal evidence against the possessor. 436 U.S. at 556 (citing See v. City of Seattle, 387 U.S. 541 (1967) and Camara v. Municipal Court, 387 U.S. 523 (1967)). As opposed to this approach, the less intrusive means theory adopted by the *Stanford Daily* district court affords innocent parties greater protection against searches than suspects. *See Theory of Probable Cause, supra* note 1, at 1493; notes 47 & 49 *supra.* Because the search involved first amendment interests, however, the Supreme Court determined that a more stringent "particular exactitude" standard of probable cause is required for press searches. *See* text accompanying notes 63 & 159 *infra.* The Supreme Court's decision thus can be read as inviting a less intrusive means rationale when authorizing a search. *See The Supreme Court, 1977 Term,* 92 HARV. L. REV. 52, 210 (1978).

[57] 436 U.S. at 562-63. In determining that a subpoena provides no appreciable increase in privacy protection over a search warrant, the Supreme Court noted that a subpoena does not necessarily involve the judiciary and can issue absent a finding of probable cause. *Id.* The Court concluded that if the probable cause requirement is satisfied, however, the nexus between the materials sought and the criminal conduct being investigated probably will meet

there need be no distinction between searches of third parties and suspects because, through the requirement of probable cause, "[t]he Fourth Amendment has itself struck the balance between privacy and public need."[58] In response to the newsmen's assertion that the inapplicability of the exclusionary rule to third parties[59] warranted the granting of a newsman's privilege,[60] the Court reasoned that barring otherwise reasonable searches under this rationale "would be placing the cart before the horse."[61] The newsmen also failed to persuade the Court that a subpoena-first rule would not undermine law enforcement efforts.[62] In conclusion, the Supreme Court found that the first amendment interests of newsmen are adequately protected by the application of the fourth amendment search warrant requirement of probable cause with "particular exactitude."[63]

Justice Powell's concurring opinion in *Stanford Daily,* explaining that his pivotal concurrence in *Branzburg* did not suggest any first amendment exception to the fourth amendment,[64] constituted a further setback to newsmen.[65] Instead of identifying an implied procedural exception for newsmen, Powell stated that his earlier opinion merely "approved recognition of First Amendment concerns within the applicable procedure."[66] Powell interpreted the *Stanford Daily* majority opinion as directing magis-

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the reasonableness standard necessary to justify a subpoena and defeat a motion to quash. *Id.* at 567. Additionally, the Court determined that if prosecutors have a choice of which alternative to pursue and select the more difficult to obtain search warrant, their selection is probably based on the "solid belief" that the search warrant route is necessary to secure and avoid destruction of the materials. *Id.* at 563. *But see* text accompanying notes 143-65 *infra.*

[58] 436 U.S. at 558.

[59] *See* note 48 *supra.*

[60] *See* text accompanying note 45 *supra.*

[61] 436 U.S. at 562-63 n.9.

[62] *Id.* at 561. Third party searches may occur before the identity of the criminal is ascertained, thereby creating the possibility that the third party is actually the criminal who may destroy or dispose of incriminating evidence. *Id.* In addition, because the fifth amendment privilege is not restricted to criminal suspects, the person served with a subpoena may interpose the protection of this testimonial privilege. *Id.* (citing Hoffman v. United States, 341 U.S. 479 (1951)). *See generally* McCormick, *supra* note 49, § 126. The Court noted that an assertion of the fifth amendment privilege, even if frivolous, is difficult to overcome, especially in the early stages of an investigation. 436 U.S. at 561.

[63] 436 U.S. at 565. The *Stanford Daily* Court found support for its "particular exactitude" requirement for search warrants in the "scrupulous exactitude" standard formulated in Stanford v. Texas, 379 U.S. 476 (1965). 436 U.S. at 564. *Stanford v. Texas* held that a search warrant generally describing all "books, records, pamphlets, . . . concerning the Communist Party of Texas . . ." was overbroad and thus unreasonable and thereby violated the fourth amendment. The particular exactitude requirement limits the magistrate's discretion in accepting less than strict compliance with the probable cause requirement. *See* text accompanying note 141 *infra.*

[64] *See* text accompanying notes 29-30 *supra.*

[65] *See* 436 U.S. at 570 n.3 (Powell, J., concurring).

[66] *Id.* Justice Powell explained that his *Branzburg* concurrence "noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime." *Id.*

trates to judge the reasonableness of the issuance of a search warrant "in light of the circumstances of the particular case," thus allowing for recognition of independent first amendment concerns.[67]

Justice Stewart, writing in dissent, offered some consolation to newsmen with his determination that the majority overlooked the limited nature of the *Stanford Daily* issue.[68] Stewart suggested that the issue was not whether the evidence sought was privileged from disclosure, but rather whether any significant societal interest would be injured by creating a judicial preference for subpoenas *duces tecum*.[69] Instead of completely barring the seizure of evidence from newsmen, the narrow question involved only the adoption of an alternative procedure to gather such evidence. Stewart argued that the Court, by misconstruing the issue, reached an erroneous decision contradicted by a long line of judicial precedent[70] requiring a prior adversary hearing when first amendment liberties are threatened.[71] Justice Stevens, also writing in dissent, argued that because present searches are no longer restricted to the fruits or instrumentalities of a crime,[72] the possibility that the possessor of documentary evidence might not honor a subpoena *duces tecum* is remote.[73] Since the only justification for an unannounced search of an innocent person is the fear that he would conceal or destroy the materials sought, Stevens reasoned that probable cause is not satisfied unless the warrant application demonstrates a possibility of this occurrence.[74]

The *Stanford Daily* holding once again brought the issue of a newsman's privilege to the forefront of American politics.[75] On April 2, 1979,

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[67] *Id.* at 570; *see* text accompanying notes 153-62 *infra*. Justice Powell's *Stanford Daily* concurrence is distinguishable from his *Branzburg* concurrence in that the balancing procedure Powell suggests in *Stanford Daily* is not contingent on an assertion of bad faith on the part of the prosecutor by the newsman. Consequently, the balancing procedure conducted pursuant to Justice Powell's *Stanford Daily* concurrence would be considered in the determination of reasonableness for *all* search warrants. *Cf.* text accompanying note 29 *supra* (*Branzburg* concurrence).

[68] 436 U.S. at 574 (Stewart, J., dissenting). Justice Stewart, in attempting to distinguish *Branzburg*, asserted that the *Stanford Daily* Court need not be concerned with the general principle that "the public has a right to every man's evidence." *Id.; see* Branzburg v. Hayes, 408 U.S. at 688. *See generally* United States v. Bryan, 339 U.S. 323, 331 (1950); Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978).

[69] 436 U.S. at 574 (Stewart, J., dissenting).

[70] *Id.* at 575; *see, e.g.*, Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).

[71] 436 U.S. at 575 (Stewart, J., dissenting). In contrast to the ex parte issuance of a search warrant, a motion to quash provides a newsman with the opportunity to challenge a subpoena in an adversary hearing. *Id.* at 576; *see* note 139 *infra*.

[72] *See* note 3 *supra*.

[73] 436 U.S. at 577-82 (Stevens, J., dissenting).

[74] *Id.* at 582-83.

[75] Justice Stewart has noted that the press is the only private business given explicit constitutional protection. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975). The protection given the press, however, goes to a prohibition on the making of a law which infringes the activity, rather than the necessity of writing a law to insure protection. The

President Carter's administration submitted major new legislation to Congress in response to the recent Supreme Court case.[76] The legislation is directed towards the Administration's concern over the possibility of the increased use of press searches, the anticipated damage to confidential sources of newsmen and the potential for the physical disruption of press operations.[77] According to the Administration, the legislation, entitled the First Amendment Privacy Protection Act of 1979, is designed to protect a newsman's information gathering activities while retaining the government's authority to conduct essential searches necessary to maintain public safety.[78] Since the Act apparently is being enacted under Congress's commerce power,[79] only those forms of public communication in or affecting interstate or foreign commerce will be covered by its provisions.[80]

Constitution delegates to the government the prosecutorial tasks of society. Controversy arises when the constitutional areas of protection overlap. Justice Stewart has observed:

> The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our society we must, on the tug and pull of the political forces in American society.

Id. at 636.

[76] S. 855, 96th Cong., 1st Sess., 125 CONG. REC. S3791 (daily ed. April 2, 1979) [hereinafter cited as S. 855]. The bill was introduced by Senator Bayh and referred to the Senate Committees on Governmental Affairs and the Judiciary. 125 CONG. REC. S3790 (daily ed. April 2, 1979).

[77] *Carter Administration Stanford Daily Announcement: Background Report,* Office of Media Liason, The White House Press Office, December 13, 1978, at 2 [hereinafter cited as *Background Report*].

[78] *Id.* at 1. President Nixon foreshadowed the outline of the proposed work product doctrine for newsmen in a 1971 news conference:

> Now, when you go, however, to the question of subpoenaing the notes of reporters, when you go to the question of Government action which requires the revealing of sources, then I take a very jaundiced view of that kind of action unless it is strictly—and this would be a very narrow area—strictly in the area where there was a major crime that had been committed and where the subpoenaing of the notes had to do with information dealing directly with that crime . . . As far as the subpoenaing of notes is concerned . . . I do not support that.

President's News Conference of May 1, 1971, 7 WEEKLY COMP. OF PRES. DOC. 703, 705 (1971), *reprinted in* Ervin, *supra* note 10, at 254.

[79] *See* S. 855, *supra* note 76, §§ 2(a) & 2(b) (both provisions are limited in applicability to materials "in or affecting interstate or foreign commerce"). Three possible constitutional bases have been advanced in the past to support federal legislation concerning special protection for a newsman. *See Newsperson's Privilege in California, supra* note 18, at 408. Under the commerce clause, Congress has the power to regulate action in or affecting interstate commerce. U.S. CONST. art. 1, § 8, cl. 3; *see* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824); note 80 *infra.* Assuming that the first amendment protection of the press is a "fundamental liberty," legislation may be premised upon the enforcement clause of the fourteenth amendment. *See* U.S. CONST. amend. XIV, § 5; Katzenbach v. Morgan, 384 U.S. 641, 650 (1966). Legislation also could be based on the privileges and immunities clause of the fourteenth amendment if the first amendment protection of the press was considered to be a privilege or immunity. *See* U.S. CONST. amend. XIV, § 1; *Newsman's Privilege After Branzburg, supra* note 9, at 188.

[80] The Supreme Court has consistently included all activities which even remotely affect

interstate commerce within the reach of the commerce clause. Comment, *Constitutional Law—Commerce Power Limited to Preserve States' Role in the Federal System,* 30 RUTGERS L. REV. 152, 157 (1976) [hereinafter cited as *Commerce Power Limited*]; *see, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942) (commerce clause extended to regulation of consumption of homegrown wheat altering national market prices). *See also* Fry v. United States, 421 U.S. 542, 547 (1975). The breadth of the commerce power subjects even purely intrastate activities which affect interstate commerce to congressional regulation. Note, *Title VII And Public Employers: Did Congress Exceed Its Powers?,* 78 COLUM. L. REV. 372, 377 (1978). In reviewing the constitutionality of congressional actions under the commerce clause, the Supreme Court has contributed to the scope of the commerce power by requiring only the establishment of a "rational basis for regarding them [federal statutes] as regulations of commerce among the States." Maryland v. Wirtz, 392 U.S. 183, 198 (1968). The wide latitude afforded the commerce clause makes it improbable that any particular actor in the dissemination of news to the public would not be involved in interstate commerce. Similarly, the unwarranted disclosure of a newsman's confidential sources can be viewed as impeding the work of a newsman, thus bringing press searches within the ambit of the commerce clause.

The Supreme Court enunciated the only real "limitation" imposed on Congress's commerce power in National League of Cities v. Usery, 426 U.S. 833 (1976). Although acknowledging the commerce power of Congress to impose minimum wage regulations on state employees, the Court held that "there 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." Id. at 845. *See generally* Comment, *National League Of Cities: State Sovereignty As A Limitation On Federal Powers,* 10 CREIGHTON L. REV. 488 (1977); *Commerce Power Limited, supra.* The *National League of Cities* Court defined aspects of sovereignty which could not be impaired by federal intervention as " 'functions essential to [a state's] separate and independent existence.'" 426 U.S. at 845 (citing Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)). In explanation, the Court identified essential state functions as those "traditional operations" of state and local governments. *Id.* at 851 n.16. Major factors determining a traditional state governmental operation are the importance of the affected state activity and whether the service is one which states have historically afforded their citizens. *Id.* at 850; *see* Comment, *Applying The Equal Pay Act To State And Local Governments: The Effect Of* National League Of Cities v. Usery, 125 U. PA. L. REV. 665, 672-76 (1977) [hereinafter cited as *The Effect Of* National League Of Cities]. The Supreme Court identified police and fire protection as examples of traditional state operations. 426 U.S. at 855. Importantly, however, the Court did not prohibit all federal interference, but rather only that which "supplants," *id.* at 848, or operates to "directly displace," *id.* at 852, the state's freedom to structure these integral operations. *See* Note, *Federal Securities Fraud Liability And Municipal Issuers: Implications Of* National League Of Cities v. Usery, 77 COLUM. L. REV. 1064, 1069 (1977). *See generally* City of Philadelphia v. SEC, 434 F. Supp. 281, 287-88 (E.D. Pa. 1977)(degree of compulsion upon state to comply with federal dictate is a major factor in identifying supplanting federal interference). An example of federal action which displaces state operations would be a federal directive ordering all searches to be conducted by federal officers. Consequently, although the Carter legislation purports to govern state officers exercising their police duties, a traditional state operation, the legislation would not directly displace state activity and thus seems unaffected by the *National League of Cities* sovereign immunity exemption from the commerce clause power.

In addition, the Supreme Court in *National League of Cities* did not foreclose the other possible constitutional bases from which the Carter legislation could seek justification. *See* note 79 *supra.* The Court expressly limited its holding to the commerce clause, stating "no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17; *see The Effect Of* National League Of Cities, *supra,* at 676-79; *see, e.g.,* Fitzpatrick v. Bitzer, 427 U.S. 445,

Subject to limited exceptions,[81] the first major provision of the proposed legislation prohibits the use of search warrants, in connection with the investigation or prosecution of a criminal offense, to obtain a newsman's[82] "work product."[83] A newsman's work product is broadly defined to include any documentary materials,[84] excluding contraband or the fruits or instrumentalities of a crime, created by or for a newsman and in his possession in connection with the planned dissemination of information to the public.[85] Termed the "subpoena-only" rule, the provision generally would require the use of a subpoena *duces tecum* whenever the government sought to obtain a newsman's work product.[86] Identified exceptions to the subpoena-only rule would permit searches if the person possessing the materials has committed or is committing the criminal offense for which the evidence is sought,[87] or if the immediate search and seizure is necessary to prevent death or serious bodily injury.[88] Government officers are specifically restricted, however, from employing a search warrant to seize materials from a newsman if the offense for which the materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained within them.[89]

The "subpoena-first" rule for non-work product documentary materials in the possession of a newsman constitutes the second major prong of the legislation.[90] Subject to broad exceptions,[91] the subpoena-first rule creates a legislative preference that the subpoena process be followed without a search in the investigation or prosecution of a criminal offense.[92] The proposed legislation defines non-work product materials as documentary

452-53, 453 n.9 (1976)(apparently upholds 1972 Amendments to Title VII of Civil Rights Act of 1964 based on § 5 of the fourteenth amendment).

[81] S. 855, *supra* note 76, § 2(a); *see* text accompanying notes 87 & 88 *infra*.

[82] "Newsman" would generically refer to members of established newspapers, free-lance writers, radio and television stations, magazines, academicians, and any other person possessing "news" materials. *Background Report*, *supra* note 77, at 3-4; *see* S. 855, *supra* note 76, § 2(a).

[83] *See* text accompanying note 84 *infra*. The legislation specifically includes notes, photographs, tapes, outtakes, videotapes, negatives, films, interview files, and drafts within "work product," *see* S. 855, *supra* note 76, § 5(a) & (b), while excluding contraband or the fruits or instrumentalities of a crime. *Id.* § 5(b).

[84] *See id.* § 5(a).

[85] *Id.* § 5(b). The materials included within a newsman's work product need not be specifically prepared for publication, but need be prepared only in connection with plans to publish. *Id.*

[86] *See* text accompanying note 85 *supra*.

[87] S. 855, *supra* note 76, § 2(a)(1).

[88] *Id.* § 2(a)(2).

[89] *Id.* § 2(a)(1). A search may be conducted, however, if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. §§ 793, 794, 797, & 798 (1978) and 42 U.S.C. §§ 2274 & 2275 (1978) and 50 U.S.C. § 783 (1978).

[90] S. 855, *supra* note 76, § 2(b).

[91] *See* text accompanying notes 95-98 *infra*.

[92] S. 855, *supra* note 76, § 2(b).

items not created by or for the press,[93] such as an extortion note or a bank camera's film of a robbery.[94] Exceptions to the subpoena-first rule include all of the exceptions to the work product subpoena-only rule.[95] Additional exceptions to the non-work product rule apply where giving notice pursuant to a subpoena *duces tecum* would result in the destruction, alteration, or concealment of the materials.[96] A broad exception also exists where all appellate remedies have been exhausted[97] and in a situation where a delay in an investigation caused by the initiation of review proceedings concerning the issuance of a subpoena *duces tecum* would threaten the interests of justice.[98]

Federal, state, and other governmental units[99] are subject to both major provisions of the proposed legislation. Any person aggrieved by a search in violation of the Act can bring a civil suit to collect civil damages.[100] A minimum of $1,000 of liquidated damages for actual injury could be awarded to a successful complainant in addition to punitive damages, reasonable attorney's fees, and other court costs.[101] The United States,[102] any state which waived its eleventh amendment immunity,[103] and any other governmental body would be liable for violations of the proposed Act by their employees.[104] In addition, these governmental institutions are restricted from asserting as defenses the immunity of their employee or his reasonable good faith belief in the lawfulness of his conduct, unless the violation complained of is that of a judicial officer.[105] If a state has not waived its sovereign immunity, the state officer or employee who violated the Act while acting within the scope or under color of his employment is liable for civil damages, but can assert a good faith compliance defense.[106] The damage action against governmental bodies under the Act is exclusive of any other civil action in response to a violation of the Act.[107] The United

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[93] Materials subject to the subpoena-first rule are defined as "documentary materials, other than work product." *Id.* § 2(b); *see id.* § 5(a).

[94] *Background Report, supra* note 77, at 3.

[95] S. 855 §§ 2(b)(1) & 2(b)(2); *see* text accompanying notes 87-89 *supra.*

[96] *Id.* § 2(b)(3).

[97] *Id.* § 2(b)(4)(A). All appellate remedies have been exhausted when a motion to quash and subsequent appeals have been denied.

[98] *Id.* § 2(b)(4)(B); *see* text accompanying note 139 *infra.*

[99] "Other governmental units" covered by the proposed legislation are the District of Columbia, Puerto Rico, any territory or possession of the United States, any local government, or any unit of state government. *Id.* § 5(c).

[100] District courts have original jurisdiction of all civil actions arising under the newsman's privilege. *Id.* § 4(f).

[101] *Id.* § 4(d).

[102] *Id.* § 4(a)(1). A claim against the United States may be settled by the Attorney General. *Id.* § 4(e).

[103] *Id.* § 4(a)(1); *see* U.S. CONST. amend. XI.

[104] S. 855, *supra* note 76, § 4(a)(1).

[105] *Id.* § 4(b).

[106] *Id.* § 4(a)(2).

[107] *Id.* § 4(c). The legislation would not foreclose a civil damage suit against a searching

States Attorney General is directed to promulgate regulations to provide for and govern the commencement of an administrative inquiry following a judicial finding of a breach of the proposed legislation.[108] Unspecified administrative sanctions imposed against the officer or employee of the United States may supplement the civil damage remedy.[109]

Although constituting a new approach to the newsman's privilege problem, the employment of a work product doctrine to protect constitutional rights by restricting good faith searches and seizures or disclosures is not a totally novel concept.[110] Attorneys have enjoyed a similar privilege since the Supreme Court's decision in *Hickman v. Taylor,*[111] which restricted discovery by opposing counsel.[112] Although the attorney work product doctrine protects from compelled disclosure materials prepared by an attorney acting for a client in anticipation of litigation, the privilege has been limited to pre-trial discovery.[113] In a recent case, an attorney attempted to invoke the work product doctrine at trial to prevent the admission into evidence of an investigator's report prepared at the attorney's request.[114] Although the Supreme Court found no need to discuss the scope of the privilege due to a finding of waiver,[115] Justice White, in a strong concurring

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officer for wrongful acts other than a violation of the statute which occur in the same course of events. 125 CONG. REC. S3793 (daily ed. April 2, 1979).

[108] S. 855, *supra* note 76, § 4(e).

[109] *Id.*

[110] Justice Stewart, dissenting in *Branzburg,* suggested a rule analogous to the proposed legislation for the issuance of a subpoena *ad testificandum.* Stewart argued that the government should be required to show probable cause that the newsman has information clearly relevant to the criminal conduct being investigated, demonstrate that no less drastic means exist, and prove a compelling and overriding interest in the information. 408 U.S. at 743 (Stewart, J., dissenting); *see Substantive and Remedial Aspects, supra* note 7, at 80 n.390 (notes similarity of Stewart's proposal to attorney work product doctrine).

[111] 329 U.S. 495 (1947). In *Hickman,* the Supreme Court affirmed the circuit court's reversal of a lower court ruling which found an attorney in contempt of court for not answering interrogatories from opposing counsel concerning the statements of four witnesses recorded in preparation for trial. *Id.* at 514.

[112] *See generally* Cooper, *Work Product of the Rulesmakers,* 53 MINN. L. REV. 1269 (1969); 58 COLUM. L. REV. 498 (1958). The *Hickman* work product doctrine is codified for civil trials in Rule 26 of the Federal Rules of Civil Procedure. The doctrine is also applied to criminal litigation. *See* United States v. Nobles, 422 U.S. at 236; FED. R. CRIM. P. 16(b)(2). The attorney work product doctrine is designed to protect the mental processes of an attorney from discovery by opposing counsel and thereby enable the attorney adequately to prepare to represent his client. In comparison, the newsman's privilege is focused on the protection of confidential sources which comprise a significant factor in the free flow of information through the press and enable the newsman adequately to serve the public.

[113] 329 U.S. at 508. *See generally* MCCORMICK, *supra* note 49, § 96. The attorney work product privilege is recognized as a qualified privilege because it may be waived. *See* United States v. Nobles, 422 U.S. at 239. Furthermore, the privilege can be overcome by a showing that a denial of an attempted discovery would "unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice." 329 U.S. at 509.

[114] United States v. Nobles, 422 U.S. at 236-40. *See generally* 16 SANTA CLARA L. REV. 391 (1976).

[115] 422 U.S. at 236-40. The *Nobles* Court stated:

opinion, denounced the wisdom of construing the majority opinion as implicitly recognizing the work product doctrine as a trial privilege.[116] Tracing the purpose of the privilege as protecting an attorney's work done in preparation for litigation from infringement, White firmly rejected any notion that the doctrine through modern interpretation should be elevated to an unprecedented role as a limitation on a judge's power to compel the production of evidentiary materials at trial.[117] The overriding distinction is that while a pre-trial discovery doctrine would only slightly injure the fact-finding process, a rule which could keep evidence from the trier of fact constitutes a serious impairment to a fair trial.[118]

Several profitable insights concerning the proposed newsman's privilege can be deduced from a comparison of the proposed privilege with the attorney work product doctrine.[119] Search warrants and subpoenas *duces tecum* are similar to pre-trial discovery techniques used in civil proceedings since both are essentially evidence gathering tools.[120] An attorney's

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> Moreover, the concerns reflected in the work product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.

Id. at 239; *cf.* State v. Montague, 55 N.J. 387, 402, 262 A.2d 398, 405 (1970)("we may assume that its [work product doctrine] underlying policy considerations will be honored at trial to the extent that they are applicable"). *But see* text accompanying notes 116-18 *infra.* Since *Nobles,* this dictum has remained dormant. Additionally, the Supreme Court has repeatedly stressed that privileges in litigation are not favored. *See, e.g.,* Herbert v. Lando, 99 S. Ct. 1635, 1648-49 (1979).

[116] United States v. Nobles, 422 U.S. at 243 (White, J., concurring).

[117] *Id.* The attorney work product doctrine represented judicial recognition of the importance of an attorney's work to the proper functioning of the adversary system. According to Justice White, however, the *Hickman* Court purposely reasoned in such a way as to avoid the evolution of the attorney work product doctrine into a privilege which could be asserted at trial. *Id.* at 245. Instead of simply holding that the work product was "privileged," White explained that the *Hickman* Court grounded its reasoning on the assertion that the discovery rules were not designed for the discovery of an attorney's work product. *Id.*

[118] *Id.* at 247-48.

[119] The legislative history of S. 855 specifically suggests a beneficial comparison with the attorney work product doctrine stating:

> The concept of "work product" as used in this statute is derived from and in many ways analogous to the concept of attorney "work product." Thus it is intended that the extensive body of case law concerning attorney "work product" is to be used to aid in the determination of which materials constitute "work product" for the purposes of this legislation.

125 CONG. REC. S3793 (daily ed. April 2, 1979).

[120] Justice White in *Nobles* noted the similarity of a grand jury investigation to pre-trial discovery. 422 U.S. at 247 n.6. A subpoena *duces tecum,* however, "cannot be used as a form of discovery tool, or for a 'fishing' expedition." United States v. Moore, 423 F. Supp. 858, 860 (S.D. W.Va. 1976). While civil discovery techniques are employed to uncover possible evidence, a search warrant and subpoena *duces tecum* serve primarily to collect evidence which has been reasonably identified. *See generally* United States v. Hegwood, 562 F.2d 946,

work product generally is exempt from discovery.[121] Reflecting the basic premise of the attorney work product doctrine,[122] a newsman's work product materials are protected in the proposed legislation because these materials are integrally related to the ability of a newsman to adequately disseminate information to the public, the essence of the newsman's function.[123] Like the attorney's privilege, the newsman's work product privilege does not keep evidence from the trier of fact.[124] A newsman remains subject to a subpoena *ad testificandum* pursuant to the *Branzburg* decision.[125] Instead of operating to infringe a fair trial,[126] the newsman's work product doctrine simply requires prosecutors to seize materials by use of a subpoena *duces tecum* from a newsman or rely on testimony under a subpoena *ad testificandum* where a search warrant previously had been utilized.[127] Additionally, evidence obtained in contravention of the proposed newsman's privilege would not be kept from the factfinder because of the inapplicability of the exclusionary rule to the legislation.[128] The Supreme Court's strict confinement of the attorney work product doctrine to pretrial discovery and the reasoning supporting the *Branzburg* holding seem to negate any possibility of the newsman's privilege evolving into a trial privilege.[129]

Both prongs of the First Amendment Privacy Protection Act of 1979 favor the use of a subpoena *duces tecum* over reliance on a search warrant.[130] Since being first judicially articulated in the district court opinion

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952 (5th Cir. 1977), *cert. denied,* 434 U.S. 1079 (1978); United States v. Schembari, 484 F.2d 931, 936 (4th Cir. 1973).

[121] *See* text accompanying notes 111-13 *supra.*

[122] *See* text accompanying note 117 *supra;* note 112 *supra.*

[123] *Background Report, supra* note 77, at 4.

[124] *See* text accompanying note 118 *supra.*

[125] *See* text accompanying note 25 *supra.*

[126] *See* text accompanying note 116 *supra.*

[127] *See* text accompanying note 175 *supra.*

[128] The exclusionary rule is limited to evidence obtained in violation of the fourth amendment. *See* note 49 *supra. See generally* Note, *The Extent Of The Exclusionary Rule,* 9 WM. & MARY L. REV. 193 (1967). In contending that legislation or regulations should be promulgated to implement the ambiguous requirements of the fourth amendment, one commentator suggests that a violation of such "constitutional rules" should make the search unreasonable under the fourth amendment and the seized materials presumably subject to the exclusionary rule. *See* Amsterdam, *supra* note 3, at 416-17.

[129] *See* text accompanying note 117 *supra.* Both the attorney and newsman's privileges focus on pre-trial techniques of gathering evidence. *See* note 120 *supra.* Apparently unlike the attorney work product doctrine, *see* text accompanying notes 113-18 *supra,* the purpose behind the newsman's privilege of protecting confidential sources could be used to argue for the creation of a trial privilege. *See* note 112 *supra.* The *Branzburg* reasoning, however, rejecting a testimonial privilege for newsmen, would seem equally applicable to a documentary privilege. *See* text accompanying notes 21-28 *supra.*

[130] The first prong of the proposed legislation is generally termed a "subpoena-only" rule for work product while the second major provision is generally referred to as a "subpoena-first" rule.

in *Stanford Daily*,[131] preference for a subpoena *duces tecum* has received strong support.[132] Although the fourth amendment requires all intrusions into personal privacy to be reasonable,[133] a different standard of proof must be met to establish the propriety of *issuing* a search warrant as opposed to a subpoena *duces tecum*.[134] Moreover, different procedures must be followed for their issuance. A search warrant can be issued in an ex parte proceeding upon a finding by a magistrate that there is "probable cause" to believe that there are materials on the premises relevant to criminal conduct being investigated and that the intrusion into privacy would be reasonable.[135] In contrast, a grand jury, or a judge after an adversarial hearing if a motion to quash is filed, issues a subpoena *duces tecum*.[136] A subpoena *duces tecum* is issued upon a general showing of "reasonableness."[137]

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[131] 353 F. Supp. 124 (N.D. Cal. 1972); *see* text accompanying notes 44-47 *supra*.

[132] *See, e.g., Search and Seizure of the Media, supra* note 1, at 972-73; 86 HARV. L. REV. 1317, 1329 (1973). *See generally Substantive and Remedial Aspects, supra* note 7, at 141.

[133] *See* note 3 *supra*.

[134] The Supreme Court held in Hale v. Henkel, 201 U.S. 43, 73-76 (1906), that requests for documents by a subpoena *duces tecum* had to meet the requirement of reasonableness under the fourth amendment. *See* note 3 *supra*. Search warrants are specifically covered by the fourth amendment. *See id.* The fourth amendment's overall reasonableness standard has been interpreted as a "substantive" limitation on invasions of personal privacy. *See* MCCORMICK, *supra* note 49, § 170. In contrast, probable cause is identified as merely a "procedural" limitation on the issuance of a search warrant. *Id.* Consequently, while all invasions of personal privacy must be reasonable, a search warrant also is governed by the procedural prerequisite of probable cause.

[135] *See* MCCORMICK, *supra* note 49, § 171; *Search and Seizure of the Media, supra* note 1, at 986. As defined by the Supreme Court, probable cause exists where "the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has or is being committed, or that identified materials connected to a crime are located at a particular place at a particular time. Draper v. United States, 358 U.S. 307, 313 (1958) and Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (both citing Carroll v. United States, 267 U.S. 132, 161 (1925)); *see* United States v. Lefkowitz, 464 F. Supp. 227, 231 (C.D. Cal. 1979); MCCORMICK, *supra* note 49, § 170 at 377. *See also* Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964)(probable cause identical for arrest and search warrants).

[136] *See Search and Seizure of the Media, supra* note 1, at 979-85.

[137] The most widely cited guidelines to determine the reasonableness of a subpoena *duces tecum* state: "(1) the subpoena may command only the production of things relevant to the investigation being pursued; (2) specification of things to be produced must be made with reasonable particularity; and (3) production of records covering only a reasonable period of time may be required." United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970); *see In re* Rabbinical Seminary, 450 F. Supp. 1078, 1084 (E.D. N.Y. 1978). A balancing of the competing interests in a particular situation colors the specific application of these standards. *See generally* text accompanying notes 143-52 *infra*. For one court's interpretation of the "relevance" standard required, see text accompanying note 146 *infra*. The "particularity" standard required is met by a showing of

> first, particularity of description so that a person attempting to exercise a subpoena may in good faith know what he is being asked to produce; and second, particularity of breadth so that a person in complying with a subpoena in good faith is not

Finding a subpoena *duces tecum* preferable to a search warrant, newsman supporters of a statutory preference for a subpoena *duces tecum* emphasize both the reasonableness standard governing the subpoena's issuance and the availability of an adversary hearing on the merits. Although an improper search of an innocent third party is not within the ambit of the exclusionary rule,[138] an unreasonable subpoena *duces tecum* can be avoided by means of a motion to quash.[139] In the process, the standard of reasonableness which has to be met to obtain a subpoena *duces tecum* can be sharpened through adversarial argument.[140] A search warrant's probable cause requirement, however, is normally satisfied simply by a magistrate's ex parte review of affidavits.[141] Furthermore, newsmen have decried the disruptive effect of an unexpected search on the activities of a busy newsroom and the possible disclosure of confidential sources other than those integrally associated with the criminal conduct being investigated which could be alleviated by the use of a subpoena *duces tecum.*[142]

Inherent in the reasonableness standard adopted to govern the issuance of a subpoena *duces tecum*[143] is a flexibility which permits the adjustment of the requirement to reflect the particular circumstances of the situation.

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harassed or oppressed to the point that he experiences an unreasonable business detriment.

In re Grand Jury Subpoena Duces Tecum, 367 F. Supp. 1126, 1132 (D. Del. 1973). A "reasonable period of time" has been defined to require some relation to the subject of the investigation, *In re* Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575, 578 (S.D. N.Y. 1961), and generally including documents accumulated within the past ten years. *In re* Grand Jury Subpoena Duces Tecum, 342 F. Supp. 709, 713 (D. Md. 1972). Judge Friendly has suggested that the modern lenient trend in judging the reasonableness of a subpoena *duces tecum* is not to analyze the description in fourth amendment terms, but rather in the less rigid review mandated by the due process clause of the fourteenth amendment. *In re* Horowitz, 482 F.2d 72, 79 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973).

[138] *See Search and Seizure of the Media, supra* note 1, at 987-88; note 49 *supra.*

[139] A motion to quash gives newsmen the opportunity to appear in an adversarial hearing, affording newsmen what has been termed first amendment "due process." *See generally* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). First amendment due process requires that a judge determine, with the assistance of adversarial arguments, whether a challenged governmental procedure improperly infringes on interests guaranteed by the first amendment before or as soon after the initiation of the governmental action as possible. *See Search and Seizure of the Media, supra* note 1, at 988 n.184. The Supreme Court has required first amendment due process where the substantive law in the case involves the first amendment. *See, e.g.,* Heller v. New York, 413 U.S. 483 (1973); Stanford v. Texas, 379 U.S. 476 (1965); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). However, when police investigatory procedures infringe on first amendment values where the criminal activity does not integrally involve first amendment safeguards, such as in *Stanford Daily,* courts usually do not afford those involved first amendment due process. *Search and Seizure of the Media, supra* note 1, at 988 n.184.

[140] *See Search and Seizure of the Media, supra* note 1, at 981-82.

[141] *See id. But see* note 57 *supra* (contrary analysis of Supreme Court in *Stanford Daily*). *See generally* MCCORMICK, *supra* note 49, § 170.

[142] *See Search and Seizure of the Media, supra* note 1, at 989 nn.188 & 189, 990 n.198; note 47 *supra.*

[143] *See* note 134 *supra.*

In most situations, the reasonableness standard is more easily satisfied than the probable cause counterpart in search warrant issuance. As one court has explained, "[V]ery little need be shown to justify a grand jury's demand for materials and that very little must suffice if the grand jury is to function."[144] Relevance is a major factor in determining reasonableness,[145] but an acceptable showing of relevance may include merely an identification of the "generic nature" of the subject matter of the criminal investigation and the establishment of "some possible relationship" of the materials to the investigation.[146] Broad descriptions are necessary in a subpoena *duces tecum* because the identity of the criminal and the precise nature of the criminal offense are usually not ascertained until the conclusion of a grand jury proceeding.[147] Although the government must make a prima facie showing of relevance,[148] compliance with the relevance standard is presumed by courts absent a motion to quash the subpoena.[149] A presumption of regularity attaches to a grand jury subpoena[150] and the heavy burden of proving unreasonableness thus falls on the petitioner.[151]

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[144] *In re* Grand Jury Subpoena Duces Tecum, 143 N.J. Super. 526, 535, 363 A.2d 936, 940 (1976).

[145] *See* note 137 *supra.* Relevance in the ordinary evidentiary sense is not required because grand juries do not know beforehand what they seek to establish. Therefore, the relationship between the evidence sought and that which has not been established cannot possibly be stated. *See* Schwimmer v. United States, 232 F.2d 855, 862-63 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). Consequently, relevancy in the context of a grand jury subpoena is measured by a less exacting standard. *In re* Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

[146] *In re* Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 997 (D. R.I. 1975).

[147] Blair v. United States, 250 U.S. 273, 282 (1919); *see* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946); Note, *Formalism, Legal Realism And Constitutionally Protected Privacy Under The Fourth And Fifth Amendments,* 90 HARV. L. REV. 945, 979 n.212 (1977) [hereinafter cited as *Formalism*]; 86 HARV. L. REV. 1317, 1324-25 (1973); note 137 *supra.*

[148] *In re* Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 995 (D. R.I. 1975). The Third Circuit, in *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973), asserted that the government must make a "preliminary showing by affidavit" that each item sought is relevant to a grand jury investigation. *Id.* at 93. Although *Schofield* could be interpreted as requiring a relevancy hearing before the issuance of a subpoena *duces tecum,* the majority of courts have rejected this possibility. *See, e.g., In re* Grand Jury Investigation, 425 F. Supp. 717 (S.D. Fla. 1977); United States v. Weiner, 418 F. Supp. 941 (M.D. Pa. 1976); *In re* Morgan, 377 F. Supp. 281 (S.D. N.Y. 1974).

[149] *In re* Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 995 (D. R.I. 1975).

[150] *In re* Lopreato, 511 F.2d 1150, 1152 (1st Cir. 1975).

[151] *Id.; see In re* Grand Jury Subpoenas Duces Tecum, 391 F. Supp. at 994-95. The burden of going forward and showing prima facie unreasonableness falls on the party served with the subpoena, while the issuing party carries the burden of persuasion. *See In re* Liberatore, 574 F.2d 78, 82-83 (2d Cir. 1978). To quash a subpoena *duces tecum,* the petitioner must prove that the description of items in the subpoena is "too sweeping in its terms" to be reasonable. United States v. Dionisio, 410 U.S. 1, 11 (1973). A subpoena *duces tecum* also can be quashed if the petitioner can establish that the power of the subpoena was directed toward accomplishing an improper objective. *See, e.g.,* United States v. Doe (Ellsberg), 455 F.2d 1270 (1st Cir. 1972). For comparable restrictions on the issuance of a search warrant, see text accompanying notes 15-17 *supra.*

When first amendment interests are affected, however, courts require the government to prove that the subject matter of the investigation is "immediate, substantial, and subordinating" and that it depict a "substantial connection" between the grand jury investigation and the subpoenaed materials.[152] Newsmen thus have maintained that a subpoena's flexible reasonableness standard is stricter in first amendment cases than the probable cause required to issue a search warrant.

The Supreme Court, however, also has recognized some flexibility in the probable cause standard applicable to the issuance of a search warrant.[153] This flexibility inures from the incorporation of the term " 'unreasonable,' the key word permeating this whole [Fourth] Amendment,"[154] into the determination of probable cause. In the context of area inspection searches, the Court relied on the fourth amendment's ultimate reasonableness requirement to temper the standard of probable cause since the protection afforded by the normal stricter probable cause standard was deemed unnecessary.[155] As the Supreme Court noted in reviewing the issuance requirements of area inspection searches, "[R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[156] The Supreme Court recently reaffirmed its recognition of flexibility in probable cause determination in civil cases by emphasizing the overall reasonableness requirement in formulating a more easily satisfied probable cause standard to govern the issuance of administrative search warrants.[157] Incorporation of the reasonableness standard, however, is not "a one-way street to be used only to water down probable cause when necessary."[158] The *Stanford Daily* Court's announcement of a "particular

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[152] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 64-66 (1975); Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972); *In re* Wood, 430 F. Supp. 41, 45 (S.D. N.Y. 1977). *See also In re* Stolar, 401 U.S. 23 (1971); United States v. O'Brien, 391 U.S. 367 (1968).

[153] *See* Camara v. Municipal Court, 387 U.S. 523, 536-39 (1967); See v. City of Seattle, 387 U.S. 541, 545 (1967). *See generally* Michigan v. Tyler, 436 U.S. 499 (1978); *In re* Establishment Inspection, 589 F.2d 1335, 1338-39 (7th Cir. 1979)(following *Camara* and *See*); Note, *Constitutional Law—Administrative Searches*—Marshall v. Barlow's, Inc.: *OSHA Needs A Warrant*, 57 N.C. L. REV. 320 (1979).

[154] Berger v. New York, 388 U.S. 41, 75 (1967)(Black, J., dissenting). The *Berger* Court reviewed the reasonableness of a wiretapping in a criminal conspiracy case. *Id.* at 45.

[155] Camara v. Municipal Court, 387 U.S. 523, 536-39 (1967). *See also* United States v. Schafer, 461 F.2d 856 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972)(quarantine inspection).

[156] Camara v. Municipal Court, 387 U.S. at 538-39.

[157] *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978). *See generally* United States v. Roux Lab., Inc., 456 F. Supp. 973, 967-77 (M.D. Fla. 1978); Marshall v. Weyerhauser Co., 456 F. Supp. 474, 483 (D. N.J. 1978). Defining probable cause for administrative searches in *Barlow's*, the Supreme Court stated, "Probable cause in the criminal law sense is not required. . . . [Instead, an acceptable standard would necessitate only a] showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " 436 U.S. at 320.

[158] *Id., cf.* Roaden v. Kentucky, 413 U.S. 496, 501 (1972)("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to

exactitude" probable cause standard to govern press searches is an example of a stricter judicial refinement of the standard in a criminal case because of the first amendment interests involved.[159] Justice Powell's *Stanford Daily* concurrence reflects this interpretation of the majority opinion.[160] Although the Court has been reluctant to identify the flexibility of probable cause in criminal cases,[161] no reason exists to prevent the continued formulation of increasingly higher standards of probable cause, grounded upon reasonableness considerations, to justify increasingly intrusive criminal searches.[162]

Although the fourth amendment itself sets forth two evidentiary standards to govern governmental invasions of personal privacy,[163] reasonableness and probable cause, the Supreme Court, in implementing these standards, focuses on the additional flexibility provided by the standards themselves. Both search warrants and subpoenas *duces tecum* are issued under procedural standards firmly rooted in the substantive reasonableness standard of the fourth amendment.[164] With a subpoena *duces tecum,* however, newsmen are given the opportunity to present adversarial arguments by filing a motion to quash.[165] In the process, newsmen can mold a slightly more favorable procedural standard for a subpoena *duces tecum.* Consequently, the substitution of a subpoena *duces tecum* for a search warrant under the proposed legislation would give newsmen a minor benefit in this respect.

The Supreme Court's *Stanford Daily* holding[166] is couched in fourth amendment analysis,[167] and the newsman's privilege is thus aptly termed a response to the *Stanford Daily* decision.[168] Although addressing first amendment concerns, the newsman's work product doctrine can be viewed

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another kind of material"); United States v. Sherwin, 572 F.2d 196, 201 (9th Cir. 1977)("stricter evaluation of reasonableness" necessary where prior restraint of right of expression). *See generally, A Procedural Standard of Reasonableness, supra* note 12, at 380-82.

[159] *See* text accompanying note 63 *supra.*

[160] *See* text accompanying note 66 *supra.*

[161] Flexibility has permeated probable cause in the context of a seizure and search of a person. *See* McCORMICK, *supra* note 49, § 173; *see, e.g.,* Pennsylvania v. Mimms, 434 U.S. 106 (1977); Terry v. Ohio, 392 U.S. 1 (1968); State in Interest of H.B., 75 N.J. 243, 381 A.2d 759 (1977).

[162] *See* Gooding v. United States, 416 U.S. 430, 464 (1974)(Marshall, J., dissenting)(alluded particularly to the nighttime search of a private home). *See generally* State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979)("when confronted with purposes, objects or circumstances not envisioned by the framers, the wiser, and indeed the proper course is to apply the reasonableness clause.").

[163] The two standards have been described as adding to the fourth amendment "the flexibility essential to realistic accommodation of essential law enforcement investigatory techniques." McCORMICK, *supra* note 49,§ 170.

[164] *See* note 134 *supra.*

[165] *See* note 139 *supra.*

[166] 436 U.S. 547 (1978); *see* text accompanying notes 48-64 *supra.*

[167] *See* text accompanying notes 54-57 *supra.*

[168] *Background Report, supra* note 77, at 1.

as a solution totally within the traditional parameters of the fourth amendment.[169] The proposed legislation seeks to establish only the preference of one fourth amendment procedure over another.[170] Absent a break from the fundamentals of the fourth amendment, the search and seizure of materials in the possession of third parties which endanger newsmen's confidential sources would be governed by the normal reasonable expectation of privacy analysis which defines the scope of the fourth amendment.[171] Since the proposed legislation restricts only a search and seizure of materials in a newsman's possession, protection would not be afforded to other third party searches which may disclose a newsman's confidential sources.[172] Consequently, a recent decision refusing to recognize a newsman's first amendment claim to extend the reasonable expectation of privacy analysis to a subpoena *duces tecum* issued to a telephone company for his toll-call records would have been unchanged by the proposed Act.[173] An extension of the newsman's privilege to materials not in his possession would require direct reliance on an emphasis of first amendment interests over fourth amendment dictates, which the current proposal specifically averts.[174]

The First Amendment Privacy Protection Act of 1979 constitutes only a more formalized restatement of the *Stanford Daily* district court's hold-

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[169] In United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977), the court specifically identified the Supreme Court's decision in Katz v. United States, 389 U.S. 347 (1967), *see* note 3 *supra*, as relying on a similar least intrusive means rationale. 553 F.2d at 157.

[170] *See* text accompanying notes 81-98 *supra*.

[171] *See* United States v. Miller, 425 U.S. 435 (1976)(no expectation of privacy in checks voluntarily conveyed to bank).

[172] *See Background Report, supra* note 77, at 5; text accompanying notes 84 & 89 *supra*.

[173] *See* Reporters Comm. for Freedom of the Press v. American Tel. & Tel., 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 1431 (1979).

[174] *Background Report, supra* note 77, at 5. The Carter Administration refrained from extending the newsman's privilege to other third party searches because of the "numerous complexities that [the Administration] believe[s] require further study." *Id.* Specific problems cited include the possible encouragement to criminal suspects to conceal evidence in the sanctuaries of third parties, selecting which relationships deserve special protection, and sorting the constitutional problems concerning state and local searches. *Id.*

In addition, recent Supreme Court decisions indicate a trend toward defining fourth and fifth amendment protections against improper searches and seizures by focusing on the act compelled by a search warrant or subpoena *duces tecum*. *See Formalism, supra* note 147, at 946; *see, e.g.*, Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976). The central issue now is whether the act of producing papers is incriminating because it may constitute a compulsory authentication of incriminating information, acknowledgement of the existence of specified documents, and a concession of control by the possessor over the documents. *See* Andresen v. Maryland, 427 U.S. at 473-74. Previous fourth amendment Supreme Court decisions, descendants of Boyd v. United States, 116 U.S. 616 (1886), centered inquiry on a consideration of the type of materials sought. *See Formalism, supra* note 147, at 946. The Supreme Court's *Stanford Daily* holding seems to comport with this modern emphasis by shifting away from an analysis of any protected first amendment interests in the materials themselves. *See* text accompanying note 63 *supra*. Consequently, an extension of the newsman's privilege to materials in the possession of third parties by the Supreme Court simply because the materials are related to first amendment interests is improbable.

ing which called for the implementation of the less drastic means approach[175] in obtaining evidence from a newsman.[176] Significantly, neither major provision of the legislation purports to establish,[177] nor does the Supreme Court seem inclined to permit,[178] a privilege which could be asserted at trial. The development of a work product doctrine for newsmen including sufficient protection for non-work product materials constitutes a logical resolution of conflicting interests that minimizes the potential infringement on the right to a fair trial without completely abandoning the protection arguably afforded the press by the first amendment. Benefiting newsmen most under the proposed legislation is the added protection confidential sources would receive which are not integrally related to the current investigation.[179] Because of the availability of an adversarial hearing after a motion is filed to quash a subpoena *duces tecum,* newsmen can challenge the legitimacy of the need for the materials before relinquishing control and participate in the application of the reasonableness standard to the particular circumstances of the case, thus molding a more favorable standard than a search warrant's probable cause counterpart. Newsmen thus would be given added protection from being compelled to produce unnecessarily documentary materials.[180] In addition, newsmen would no longer have to tolerate the physical disruption of their newsroom activities.[181] Newsmen, although still not having secured a true "privilege" to protect the disclosure of their confidential sources,[182] should recognize and support the proposed Act as a step forward in the campaign to prevent the gradual erosion by the Supreme Court of their first amendment interests and ability to competently serve the public.

ALAN A. SANT'ANGELO

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[175] *See* note 46 *supra.*

[176] *See* text accompanying notes 44-47 *supra.*

[177] *See* text accompanying notes 81-98 *supra.*

[178] *See* text accompanying notes 115-19 *supra.*

[179] Thorough searches of a newsroom, implemented by reading every file and document until the information sought is located, subject all of a newsman's confidential sources to possible disclosure. *See* Zurcher v. Stanford Daily, 436 U.S. at 571 (Stewart, J., dissenting).

[180] *See* text accompanying notes 143-65 *supra.*

[181] *See* note 47 *supra.* An all day search recently was undertaken of the San Diego Street Journal office. *See Search and Seizure of the Media, supra* note 1, at 957 n.3. In another instance of the physical disruption of a news office by a police search, radio station KPFK-FM's operations were interrupted for eight hours as police sought a "communique" from the New World Liberation Front which took credit for a bombing. *Id.* at 957-58. *See generally* Zurcher v. Stanford Daily, 436 U.S. at 571 (Stewart, J., dissenting).

[182] *See* text accompanying notes 175-76 *supra.*