

Memorandum



Subject	Date
<u>Stanford Daily</u> Guidelines	November 20, 1981
To The Attorney General	From John Roberts <i>JR</i> Special Assistant to the Attorney General

In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the Supreme Court ruled that the First, Fourth, and Fourteenth Amendments did not prohibit the issuance and execution of search warrants to obtain information in the files of a newspaper, even though the newspaper and its employees were not suspected of any wrongdoing. Local authorities had probable cause to believe that the offices of the Stanford Daily contained photographs which would help police identify students guilty of assaulting officers. The photographs were taken during coverage of a student riot by the Stanford Daily. The Supreme Court upheld the validity of the warrants permitting police to search for the photographs, and rejected arguments that since no Stanford Daily staff members were suspected of wrongdoing, the police had to obtain the photographs by the less intrusive means of a subpoena duces tecum rather than a search.

In the wake of the Stanford Daily decision Congress, under great pressure from the media lobby, enacted the "First Amendment Privacy Protection Act," 42 U.S.C. 2000aa. The Act essentially makes it unlawful to conduct newsroom searches or searches of journalists for their work product -- i.e., the sort of search involved in the Stanford Daily case -- unless the journalist himself is suspected of criminal activity, or unless an immediate search is necessary to prevent death or serious bodily injury. Searches for non-work product tangible objects in the possession of a journalist are also prohibited, with the exceptions noted above and an additional exception if there is reason to believe the journalist would destroy the objects sought if he were served with a subpoena duces tecum or summons. Persons aggrieved by a violation of the foregoing provisions have a civil action for damages, 42 U.S.C. 2000aa-6.

In overturning the Stanford Daily decision, Congress went beyond the newsroom problems and addressed in general searches of third parties who are not suspected of crime but have evidence other than contraband or the fruits and instrumentalities of the crime. Congress directed the Attorney

General to develop guidelines governing such searches of third parties not related to a suspect. The Guidelines were to include: 1) recognition of the privacy interests of the third party, 2) use of the least intrusive means possible, 3) special consideration for confidential relationships such as attorney/client or doctor/patient, and 4) a requirement that any searches be approved by the government attorney. The Guidelines are to be binding, and violation of them is to result in disciplinary action. The Guidelines are not, however, to support motions to suppress evidence in any criminal proceeding.

On April 13, 1981, you issued the Guidelines. 46 Fed. Reg. 22362, 28 CFR Part 59. In general the Guidelines established a preference for the use of summonses or subpoenas duces tecum rather than search warrants when the materials are in the possession of a party unrelated to the suspect, unless the use of these means would substantially jeopardize the availability or usefulness of the evidence. Approval by a government attorney is required prior to the issuance of any third party search warrants. In the case of search warrants affecting a confidential relationship, warrants are not to be issued unless the use of alternative means would substantially jeopardize the availability or usefulness of the evidence, the material sought is of substantial importance in the case, and approval has been obtained from an appropriate Deputy Assistant Attorney General. The Guidelines also set forth factors to consider in deciding if the use of a summons or subpoena duces tecum will substantially jeopardize the availability or usefulness of evidence, thus justifying the use of a search warrant.