

# The Burger Court Opinion Writing Database

## *Zurcher v. Stanford Daily*

436 U.S. 547 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 12, 1977

RE: (76-1484 - Zurcher v. Stanford Daily  
(  
(76-1600 - Bergna v. Stanford Daily

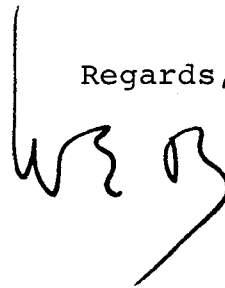
MEMORANDUM TO THE CONFERENCE:

Lewis has just mentioned to me the desirability of having the Solicitor General file a brief amicus curiae in the above case.

No application for leave to file a brief amicus curiae has been made. It seems to me that it would be helpful to have the Solicitor General's views. I suggest that we invite him to file a brief. This case is slightly more than one month from argument and this should give them sufficient time.

Absent dissent by Wednesday, we will make this request.

Regards,



W. E. Brennan  
Dec 177

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 15, 1977

Re: (76-1484 - Zurcher v. Stanford Daily  
(  
(76-1600 - Bergna v. Stanford Daily

MEMORANDUM TO THE CONFERENCE

There being a "negative" or "silent" majority to ask the Solicitor General (with a response of course) for an amicus memo, the Clerk is proceeding via telephone request. This will be by way of typewritten submission provided readable copies are filed.

If necessary, a response to the Solicitor General could be filed post argument.

Regards,

WRB

cc: The Clerk

Wm Brewer  
OCT 77

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 8, 1978


Dear Byron:

Re: 76-1484;1600 Zurcher; Bergna v. Stanford Daily

I join. I will add:

"I see no need to distinguish between newspaper offices, offices of doctors, lawyers and many others whose premises contain sensitive, confidential material. I would, of course, not give the "press" a lesser protection; I would protect all equally. See my concurring opinion in 76-1172 First National Bank of Boston v. Bellotti dated \_\_\_\_\_."

Regards,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 30, 1978

MEMORANDUM TO THE CONFERENCE

Re: (76-1484 Zurcher v. The Stanford Daily  
(76-1600 Bergna v. The Stanford Daily

Through some mischance the print shop included in this case the concurring opinion which I had "killed." This will be corrected before it comes down tomorrow.

Again I will not be present today and probably not tomorrow since on my trip to Alabama I developed very severe laryngitis, which will take a number of days to clear.

Regards,

WEB

*Wm Brown*  
*Oct 77*

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2  
✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 9, 1978

RE: Nos. 76-1484 and 76-1600 James Zurcher, et al. and  
Louis P. Bergna, et al. v. The Stanford Dailey, et al.

Dear Byron:

Will you please add at the foot of your opinion  
"Mr. Justice Brennan took no part in the consideration  
or decision of this case.

Sincerely,

*Bul*

Mr. Justice White

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 14, 1978

76-1484, Zurcher v. Stanford Daily  
76-1600, Bergna v. Stanford Daily

Dear Byron,

In due course I shall circulate a dissenting opinion in these cases.

Sincerely yours,

PS  
✓

Mr. Justice White

Copies to the Conference

PS  
Dear Mr. Justice  
your dissent  
JH

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 27 APR 1978

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART, dissenting.

Believing that the search by the police of the offices of The Stanford Daily infringed the First and Fourteenth Amendments' guarantee of a free press, I respectfully dissent.<sup>1</sup>

### I

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time<sup>2</sup> will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast,

<sup>1</sup> I agree with the Court that the *Fourth* Amendment does not forbid the issuance of search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." *Ante*, at 11.

<sup>2</sup> One search of a radio station in Los Angeles lasted over eight hours. Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 Stan. L. Rev. 957, 957-959 (1976).



SEE PAGES: 1, 6

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_  
28 APR 1978

Recirculated: \_\_\_\_\_

21 DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL  
joins, dissenting.

Believing that the search by the police of the offices of The  
Stanford Daily infringed the First and Fourteenth Amend-  
ments' guarantee of a free press, I respectfully dissent.<sup>1</sup>

### I

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paper offices burden the freedom of the press. The most  
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such a visitation by the police is physical disruption of the  
operation of the newspaper. Policemen occupying a news-  
room and searching it thoroughly for what may be an extended  
period of time<sup>2</sup> will inevitably interrupt its normal operations,  
and thus impair or even temporarily prevent the processes of  
newsgathering, writing, editing, and publishing. By contrast,

<sup>1</sup> I agree with the Court that the *Fourth* Amendment does not forbid the  
issuance of search warrants "simply because the owner or possessor of the  
place to be searched is not then reasonably suspected of criminal involve-  
ment." *Ante*, at 11.

<sup>2</sup> One search of a radio station in Los Angeles lasted over eight hours:  
Note, Search and Seizure of the Media: A Statutory, Fourth Amendment  
and First Amendment Analysis, 28 Stan. L. Rev. 957, 957-959 (1976).

SEE PAGES: 17

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_

Recirculated: 15 MAR 1978

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL  
joins, dissenting.

Believing that the search by the police of the offices of The  
Stanford Daily infringed the First and Fourteenth Amend-  
ments' guarantee of a free press, I respectfully dissent.<sup>1</sup>

### I

It seems to me self-evident that police searches of news-  
paper offices burden the freedom of the press. The most  
immediate and obvious First Amendment injury caused by  
such a visitation by the police is physical disruption of the  
operation of the newspaper. Policemen occupying a news-  
room and searching it thoroughly for what may be an extended  
period of time<sup>2</sup> will inevitably interrupt its normal operations,

<sup>1</sup> I agree with the Court that the *Fourth* Amendment does not forbid the  
issuance of search warrants "simply because the owner or possessor of the  
place to be searched is not then reasonably suspected of criminal involve-  
ment." *Ante*, at 11. Thus, contrary to the understanding expressed in  
the concurring opinion, I do not "read" anything "into the *Fourth* Amend-  
ment." *Ante*, at 1. Instead, I would simply enforce the provisions of the  
*First* Amendment.

<sup>2</sup> One search of a radio station in Los Angeles lasted over eight hours.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 13, 1977

Re: Nos. 76-1484 & 76-1600 - Zurcher v. Stanford  
Daily

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Dear Chief:

The views of the Solicitor General would very likely be useful; but even if he has the time to prepare them prior to argument, the parties would very likely not have time to respond in writing or to prepare an intelligent oral response. Perhaps we should anticipate supplemental briefing after argument if requested.

Sincerely,



The Chief Justice

Copies to Conference

Wm Brennan  
oc 177

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 3/7

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[March —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

"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."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be

Supreme Court of the United States  
Washington, D. C. 20543

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CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 10, 1978

Re: 76-1484 - Zurcher v. Stanford Daily

&

76-1600 - Bergna v. Stanford Daily

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Dear Lewis,

At your request, I shall eliminate the sentence beginning with "Of course" in the full paragraph on page 19. I suggest substituting for that sentence and the next two, the following:

Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.

Is this still too much of an invitation to state lawmakers?

I shall also eliminate the last sentence of the full paragraph on page 18. I should tell you, however, that as originally written the paragraph had still another sentence:

The prospect of a reporter, editor or publisher cowering before a prosecutor with a search warrant in his hand, if ever realistic, is not a recurring possibility.

Mr. Justice Powell  
March 10, 1978  
Page 2

I was also going to footnote the poem which was in an early draft of Branzburg but which someone thought I should eliminate:

Two newsmen upset a D. A.  
With a scandalous expose;  
They lost on the First  
And were jailed, unreversed,  
But the press put the D. A. away.

The poetry is not original. See Guest & Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources". 64 N.W.U. L. Rev. 18, 48 n. 148 (1969).

Sincerely yours,



Mr. Justice Powell

cc: Mr. Justice Rehnquist

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 18-19

To: The Chief Justice ✓  
Mr. Justice Brennan ✓  
Mr. Justice Stewart ✓  
✓ Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 3/13

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[March —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

"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."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be

✓✓  
op. 4. 6. 7. 8. 9. 13. 17

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 4/28/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[March —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

"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."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: Cases heretofore held for Nos. 76-1484 & 76-1600 --  
Zurcher v. Stanford Daily & Bergna v. Stanford Daily

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Both of the cases held for Stanford Daily raise questions concerning the application of the Civil Rights Attorney's Fees Awards Act of 1976, an area which Stanford Daily did not explore in light of its holding that there was no constitutional violation. Accordingly, they probably should be held for No. 76-1660, Hutto v. Finney, unless John advises otherwise. No. 77-270, Stanton v. Bond, raise the question of the application of the Eleventh Amendment to the award of attorneys' fees against state officials. No. 77-881, Fasi v. Pokini, raises the question of whether the Act applies to actions pending at the time it became effective.

Sincerely,

  
B.R.W.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1484, Zurcher v. The Stanford Daily  
No. 76-1600, Bergna v. The Stanford Daily

I vote to affirm the judgment of the Court of Appeals. On the record below, the search was impermissible under the First and Fourth Amendments. At the very least, before the police can institute a general search of a newspaper office, there must be some showing that evidence would be destroyed if a subpoena were issued instead of a search warrant. The Fourth Amendment protection against "unreasonable" searches may require the same showing whenever evidence is sought from a third party.

*TM.*

T.M.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 27, 1978

Re: No. 76-1484 - Zurcher v. Stanford Daily  
No. 76-1600 - Bergna v. Stanford Daily

Dear Potter:

Please join me in your dissent.

Sincerely,

*TM.*

T.M.

Mr. Justice Stewart

cc: The Conference

✓  
✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 13, 1978

Re: No. 76-1484 - Zurcher v. Stanford Daily  
No. 76-1600 - Bergna v. Stanford Daily

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

cc: The Conference

December 12, 1977

76-1484 and 76-1600 - Zurcher, et als  
v. The Stanford Daily

Dear Chief:

Over the weekend I took a look at some of the briefs in the above case which is set for argument, I believe, in January.

This is the case involving the issuance of a search warrant against the Stanford student newspaper. In a subsequent suit against the magistrate who issued the warrant, the prosecuting attorney who requested it, and the police officers who served it, the federal district court granted declaratory judgment relief and awarded attorney's fees of \$47,000. The DC's decisions, substantially adopted by CA9, held - in effect - that before a search warrant could be issued against a "third party" (as distinguished from a suspect) there must be probable cause to believe that a subpoena duces tecum would not have served the purpose.

The federal courts in California also rejected claims to immunity (except for the judge), holding that attorney's fees were appropriate - without regard to immunity - where the only relief sought was for a declaratory judgment and an injunction.

As of this date, we have no brief amicus from the Solicitor General. All of the briefs are not yet in, and it may well be that we will hear from the SG prior to argument. In view, however, of the importance of this case to law enforcement generally, I think it would be helpful to the Court to have the views of the SG.

My file does not indicate that these have been requested. I wonder what you think about this?

Sincerely,

LFP

The Chief Justice

March 10, 1978

No. 76-1484 Zurcher v. Stanford Daily and  
No. 76-1600 Bergna v. Stanford Daily

Dear Byron:

Your suggested change on page 19 is fine with me.

I will still be with you if you include the poem about the "scandalous expose". It would be great!

Many thanks.

Sincerely,

Mr. Justice White

cc: Mr. Justice Rehnquist

LFP/lab

✓  
✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 10, 1978

No. 76-1484 Zurcher v. The Stanford Daily and  
No. 76-1600 Bergna and Brown v. The Stanford Daily

Dear Byron:

Please join me in your opinion of the Court.

I may write a short concurring opinion including some of the thoughts I expressed in Conference, but as presently advised I probably will not write.

Sincerely,

*Lewin*

Mr. Justice White

Copies to the Conference

LFP/lab

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice

Mr. Justice Brennan

Mr. Justice Stewart

Mr. Justice White

Mr. Justice Marshall

Mr. Justice Blackmun

Mr. Justice Rehnquist

Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 11 MAY 1978

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,

76-1484

v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,

76-1600

v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of the dissenting opinion. As I understand the dissent, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,<sup>1</sup>

<sup>1</sup> For example, respondent had announced a policy of destroying any photographs that might aid prosecution of protestors. App. 118, 152-153. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, respondent's policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent would be of no utility in face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticality of a subpoena as opposed to a search warrant.

At oral argument, counsel for respondent stated that the announced

Wm Brennan  
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✓✓  
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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ 22 MAY 1978

**SUPREME COURT OF THE UNITED STATES**

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of the dissenting opinion. As I understand the dissent, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,<sup>1</sup>

<sup>1</sup> For example, respondent had announced a policy of destroying any photographs that might aid prosecution of protestors. App. 118, 152-153. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, respondent's policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent would be of no utility in face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticality of a subpoena as opposed to a search warrant.

At oral argument, counsel for respondent stated that the announced

J  
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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Johnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: 24 MAY 1978

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of MR. JUSTICE STEWART's dissenting opinion. As I understand that opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,<sup>1</sup> I agree with the Court that there is no constitutional basis for such a reading.

<sup>1</sup> For example, respondent had announced a policy of destroying any photographs that might aid prosecution of protestors. App. 118, 152-153. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, respondent's policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent would be of no utility in face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticality of a subpoena as opposed to a search warrant.

At oral argument, counsel for respondent stated that the announced

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 7, 1978

Re: Nos. 76-1484 and 76-1600 - Zurcher v. Stanford Daily

Dear Byron:

Please join me.

Sincerely,

*WHR*

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 14, 1977

Re: 76-1484; 76-1600 - Zurcher v. Stanford Daily

Dear Chief:

As much as I respect the Solicitor General, I see no need to seek his advice in this case. There is no federal statute or federal agency involved.

Respectfully,



The Chief Justice

Copies to the Conference

Wm Brennan  
cc: 77

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 14, 1978

Re: 76-1484 - Zurcher v. Stanford Daily  
76-1600 - Bergna v. Stanford Daily

Dear Byron:

Because I am still not sure of my position,  
I will wait for the dissent.

Respectfully,



Mr. Justice White

Copies to the Conference

✓ —✓  
Mo: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

76-1484 - Zurcher v. The Stanford Daily

76-1600 - Bergna v. The Stanford Daily

From: Mr. Justice Stevens

Circulated: MAY 22 1978

MR. JUSTICE STEVENS, dissenting.

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The novel problem presented by this case is an outgrowth of the profound change in Fourth Amendment law that occurred in 1967, when Warden v. Hayden, 387 U.S. 294, was decided. The question is what kind of "probable cause" must be established in order to obtain a warrant to conduct an unannounced search for documentary evidence in the private files of a person not suspected of involvement in any criminal activity. The Court holds that a reasonable belief that the files contain relevant evidence is a sufficient justification. This holding rests on a misconstruction of history and of the Fourth Amendment's purposely broad language.

The Amendment contains two clauses, one protecting "persons, houses, papers, and effects, against unreasonable searches and seizures," the other regulating the issuance of warrants: "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." When these words were written, the procedures of the Warrant Clause were not the primary protection against

✓  
To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

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## SUPREME COURT OF THE UNITED STATES

Nos. 76-1484 AND 76-1600

James Zurcher, Etc., et al., Petitioners,  
76-1484 v.

The Stanford Daily et al.

Louis P. Bergna, District Attorney,  
and Craig Brown, Petitioners,  
76-1600 v.

The Stanford Daily et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Ninth Circuit.

[May —, 1978]

MR. JUSTICE STEVENS, dissenting.

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