FEDERAL LAW—CITICASTERS v. McCASKILL: PROBING THE PRIVACY PROTECTION ACT OF 1980

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INTRODUCTION

In 1978, the United States Supreme Court decided that the Fourth Amendment empowered police to use a search warrant to forcefully enter the premises of a student newspaper office to look for evidence of a crime, even though none of the students were suspects in the crime. This holding produced howls of protest from the American public, especially from members of the press, who claimed that confidential sources would disappear in the face of the knowledge that law enforcement officers might search offices of the press at any time for evidence that might aid them in solving a crime. They feared that since a search warrant allowed police to rummage through press offices in search of criminal evidence, such searching could inadvertently endanger the anonymity of sources, cause reporters to refrain from keeping notes, and would expose

1. The Fourth Amendment to the United States Constitution provides the following:

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

U.S. CONST. amend. IV.

2. A search warrant is a written order issued by a justice or magistrate authorizing a law enforcement officer to enter private property to search for, and seize, any property that constitutes contraband, things criminally possessed, or evidence of the commission (or planned commission) of a crime. See BLACK'S LAW DICTIONARY 1350 (6th ed. 1990) (citing FED. R. CRIM. P. 41).


In May of 1978 the Court came down with a decision in Zurcher v. Stanford Daily, an opinion which leading newspapers immediately denounced as "a first step toward a police state"; "This assault stands on its head the history of both the First and Fourth Amendments"; "The privacy rights of the law-abiding were shabbily treated by the Supreme Court the other day . . . ."

Id., reprinted in 1980 U.S.C.C.A.N. at 3952 (footnotes and citation omitted); see also Zurcher, 436 U.S. at 563-64. For a list of letters and articles written by members of the press in response to Zurcher, see infra note 31.
confidential records.\(^5\) This holding was seen as threatening the First Amendment right to freedom of the press.\(^6\)

In response to the Supreme Court's interpretation of the First and the Fourth Amendments in that case,\(^7\) Congress passed the Privacy Protection Act of 1980 ("Privacy Protection Act" or "Act").\(^8\) The provisions of the Privacy Protection Act provide protections to citizens beyond those offered by the Constitution by requiring police use of subpoenas,\(^9\) rather than search warrants, to effect searches on the premises of non-suspects engaged in First Amendment activities.\(^10\) The purpose of the Act is to ensure the protection of First Amendment rights of freedom of speech and the press, while permitting law enforcement officers to obtain information needed for criminal investigations by the less invasive tool of subpoenas.\(^11\) The Act contains several exceptions which allow the use of search warrants, but does not specify who decides whether one of the exceptions applies.\(^12\)

\(^5\) See Zurcher, 436 U.S. at 563-64.
\(^6\) The First Amendment of the United States Constitution provides the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
\(^7\) The First Amendment protects freedom of speech and of the press. See supra note 6 for the text of the First Amendment.
\(^8\) The Fourth Amendment protects the privacy of citizens by restricting law enforcement officers' ability to search a person's premises for evidence of a crime, requiring that in most cases they may do so only after procuring a search warrant issued by a neutral magistrate upon a showing of probable cause. See supra note 1 for the text of the Fourth Amendment. For a discussion of the standard magistrates and courts use to determine whether police have "probable cause," see infra note 29.
\(^9\) A magistrate is an appointed or elected judicial officer at the state or local level with limited powers, including the power to issue search warrants. See Black's Law Dictionary 951 (6th ed. 1990). For the purpose of this Note, the term "magistrate" is meant to encompass judges as well, who in possessing greater power, may also issue search warrants. This term is not meant to mean Federal magistrates.
\(^12\) See 42 U.S.C. § 2000aa(a)-(b). For a list of these exceptions, see infra note 88.
In 1995, in *Citicasters, Inc. v. McCaskill*, a television station sued police and the county prosecutor under the Privacy Protection Act, claiming that the Act required the warrant-issuing magistrate to make a specific ruling that a warrant, rather than a subpoena, was appropriate under one of the stated exceptions to the Act. The United States Court of Appeals for the Eighth Circuit found no language in the text of the Privacy Protection Act discussing the magistrate's role in the decision to use a warrant. The majority concluded that Citicasters' position was incorrect, and that Congress had deliberately avoided imposing specific procedures on states' judicial or law enforcement entities.

Because no language in the Act specifically addressed the issue at hand, the dissenting opinion focused on Congress' stated goals in passing the Privacy Protection Act—bolstering First and Fourth Amendment rights—to decide whether a law enforcement officer should articulate in the warrant application the exception that prompted the perceived need for a warrant. The dissent examined the Act's legislative history and the circumstances surrounding its passage, and found evidence to support Citicasters' position that under the Privacy Protection Act, a neutral magistrate should decide whether circumstances called for a search warrant.

This Note examines Citicasters' differing interpretations of the Privacy Protection Act's silence on the issue of who has the power to decide whether a search warrant is appropriate, and focuses on the underlying constitutional concerns of these interpretations. The majority treated Congress' silence regarding the details of procedure as intentional, and asserted that Congress did not think it necessary to intrude to that extent on state and local police procedures, thus protecting the rights of states under the Tenth Amendment. The dissent found Congress' silence ambiguous, and asserted that without procedural provisions requiring that a magistrate rule that

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14. See infra note 29 and accompanying text for a discussion of search warrants. For a discussion of subpoenas, see infra note 31 and accompanying text.
15. See *Citicasters*, 89 F.3d at 1353-54.
16. See id. at 1354. See infra notes 177 and 213 and accompanying text for a discussion of methods by which courts interpret "silence" in a statute.
17. See *Citicasters*, 89 F.3d at 1355.
18. See id. at 1357-60 (Bright, J., concurring in part and dissenting in part).
19. See id. at 1358 (Bright, J., concurring in part and dissenting in part).
20. See id. (Bright, J., concurring in part and dissenting in part).
21. See id. at 1357 (Bright, J., concurring in part and dissenting in part).
22. See id. at 1354-55.
one of the enumerated exceptions to the Privacy Protection Act was applicable in a given police investigation, the Act did not adequately reflect Congress' goals of protecting First Amendment rights and enhancing Fourth Amendment rights.\textsuperscript{23}

There is an abundance of evidence to support both the majority and the dissent's interpretations of congressional intent. However, this Note asserts that the dissent's interpretation of congressional silence impermissibly stretches the bounds of judicial authority and creates an unconstitutional reading of the statute. In light of current Tenth Amendment jurisprudence, this Note proposes that courts apply a "clear statement" rule when interpreting the extent of federal intrusion into traditional realms of state control, such as law enforcement.\textsuperscript{24} In other words, unless Congress expressly states in a statute that it intends to impose procedures on state and local governments, courts should not read such implications into an act.

Part I of this Note provides background material on the Fourth Amendment and search and seizure procedures, and discusses \textit{Zurcher v. Stanford Daily}.\textsuperscript{25} Part II provides a summary of the legislative history of the Privacy Protection Act, and discusses the guidelines promulgated by the Justice Department in response to the Act. Part III discusses both the district court and court of appeals decisions in \textit{Citicasters v. McCaskill}.\textsuperscript{26} Part IV explores the conflicting interpretations of congressional intent that can be derived from the legislative history and surrounding circumstances, and examines the Tenth Amendment concerns expressed by the majority opinion in \textit{Citicasters}. The Note concludes that congressional silence should be presumed intentional because of concerns of federalism, while at the same time recognizing that the Privacy Protection Act, as written, does not effectively reflect Congress' stated goal in passing the Act.

\textsuperscript{23} See \textit{id.} at 1358-60 (Bright, J., concurring in part and dissenting in part).
\textsuperscript{24} See infra notes 274-77 and accompanying text for a discussion of the "clear statement" theory.
\textsuperscript{25} 436 U.S. 547 (1978).
\textsuperscript{26} 883 F. Supp. 1282 (W.D. Mo. 1995), rev'd, 89 F.3d 1350 (8th Cir. 1996).
I. THE CAREFULLY BALANCED SCALES: POLICE POWER AND PRIVACY UNDER THE FOURTH AMENDMENT

A. Freedom of the Press and the Search and Seizure Provision of the Fourth Amendment

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures of their person, home, papers and effects. To effectuate this goal, the Fourth Amendment requires that searches be reasonable, and that search warrants only be issued when supported by probable cause.

The Fourth Amendment attempts to strike a balance between the privacy rights of citizens and the public's need for protection. In several cases, the Supreme Court has examined the privacy interests of citizens who were criminal suspects to determine whether there were circumstances in which law enforcement officers should use the less invasive tool of the subpoena instead of the relatively

27. See U.S. Const. amend. IV. See supra note 1 for the text of the Fourth Amendment.


29. Presumably, a search warrant is required if the search would not be within a person's reasonable expectations of privacy. A search warrant is a general indication of urgent need on the part of the government for items relevant to proof of a crime (or enforcement of other federal laws). Probable cause, the threshold proof requirement for the issuance of a warrant, has been defined in differing ways. The standard is agreed to be lower than that of admissibility at a trial; it is "only the probability, not a prima facie showing" that the evidence sought is in the place to be searched. Spinelli v. United States, 393 U.S. 410, 419 (1969). The "totality of the circumstances" test for probable cause was articulated in Illinois v. Gates, 462 U.S. 213 (1983). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238.


31. A subpoena compels the production of materials by the use of a document
intrusive search warrant when seeking information or evidence from a suspect's residence or business.\textsuperscript{32} In the late nineteenth century, the Court held that the use of search warrants for contraband or fruits and instrumentalities of crimes did not violate the privacy interests of criminal suspects, but that use of search warrants for documents or records ("mere evidence" that would be useful in proving a suspect's guilt) did violate the Fourth Amendment.\textsuperscript{33} The Court found such searches facially unreasonable since they were intended to produce evidence that would result in violations of an individual's Fifth Amendment protection against self-incrimination.\textsuperscript{34}

However, this analytical approach changed in 1967, in \textit{Warden v. Hayden}.\textsuperscript{35} In \textit{Hayden}, the Supreme Court ruled that search warrants for any kind of evidence were allowed by the Fourth Amend-

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\text{mailed or presented at the door. The individual is served with the subpoena, and is told to report to a court at a particular time and place in the future, bringing with her the particular documents sought. Subpoena procedure provides a mechanism for objection prior to surrender of the requested documents, and, as noted by the Supreme Court in \textit{Zurcher}, "[u]nlike the individual whose privacy is invaded by a search, the recipient of a subpoena may assert the Fifth Amendment privilege against self-incrimination in response to a summons to produce evidence or give testimony." Zurcher v. Stanford Daily, 436 U.S. 547, 561 n.8 (1978) (citing Maness v. Meyers, 419 U.S. 449 (1975)); see also \textit{Fed. R. Crim. P. 17(c)}; Jose M. Sario, Note, \textit{The Privacy Protection Act of 1980: Curbing Unrestricted Third-Party Searches in the Wake of Zurcher v. Stanford Daily}, 14 U. Mich. J.L. Reform 519, 524-33 (1981).}

With a search warrant, officers may immediately enter the property where the information is thought to be located, and may rifle through the files in search of the requested material. There is no mechanism for objection prior to the search. Instead, if in a subsequent court proceeding the court finds that the search warrant was improperly issued, the mechanism for relief is the exclusion of the evidence seized. If the search took place on the premises of a non-suspect, there is no relief for that non-suspect. \textit{See}, \textit{e.g.}, \textit{Fed. R. Crim. P. 41}; \textit{see also} Sario, supra. Members of the press, who may rely on confidential sources for information, were particularly threatened by the possibility of loss of confidentiality through such search processes. \textit{See generally} Dwight L. Teeter, Jr. & S. Griffin Singer, \textit{Search Warrants in Newsrooms: Some Aspects of The Impact of Zurcher v. The Stanford Daily}, 67 Ky. L.J. 847 (1978-79) (discussing the impact of the \textit{Zurcher} case, Teeter and Singer provide a detailed account of the response of the press to the decision).

32. \textit{See} Boyd v. United States, 116 U.S. 616 (1886) (providing that government has no right to seize private papers of an individual to be used against him in a civil or criminal case); \textit{see also} Gouled v. United States, 255 U.S. 298 (1921) (providing that government may not use search and seizure procedures to secure any evidence for the purpose of proving a crime against the person whose premises are searched).


34. \textit{See} Boyd, 116 U.S. at 630; Gouled, 255 U.S. at 306.

35. 387 U.S. 294 (1967). Overruling \textit{Gouled}, the Court noted that "the principal object of the Fourth Amendment is the protection of privacy rather than property." \textit{Id.} at 304.
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ment because the language of the amendment protected all privacy interests equally, and that an intrusion could be made only "after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a 'neutral and detached magistrate.'"36 While the Court in Hayden specified that "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction,"37 the Court did not specify that the evidence sought must be in the hands or in the location of the suspect. By structuring the language in this way, "the evidence" might properly be found anywhere—in the hands of suspects and non-suspects both. However, until Zurcher v. Stanford Daily,38 the Court had not specifically held that the Fourth Amendment allowed the use of search warrants if law enforcement officers sought criminal evidence from non-suspects.

B. Zurcher v. Stanford Daily

The Zurcher case answered the question of whether, in the Court's opinion, law enforcement officers could procure a search warrant to search a non-suspect's home or business for evidence of a crime. The Supreme Court ruled that the Fourth Amendment created no separate set of standards for searches of non-suspects' properties, even in light of the First Amendment considerations relevant in Zurcher.39 Therefore, the district court's imposition of subpoena procedures on law enforcement officers under such circumstances was incorrect.40 The Court suggested that if Congress wished to quell the press' fears that allowing such searches would reveal protected sources and restrict First Amendment freedoms, Congress could devise some legislation that would impose limits on police searches of press locations.41

1. Zurcher Decision Interprets Fourth Amendment Expansively

In Zurcher v. Stanford Daily, the Court held that the Fourth

36. Id. at 309-10. Suspects could, however, use the self-incrimination protection of the Fifth Amendment to prove a search "unreasonable." See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 766 n.26 (1994).
39. See id. at 565.
40. See id. at 567-68.
41. See id. at 567.
Amendment did not prohibit police use of search warrants for evidentiary materials sought from non-suspect third parties. The facts of Zurcher arose in the context of a 1971 Stanford University student protest, where protesters injured several police officers. Members of the student newspaper, the Stanford Daily, photographed the violence as it occurred, and some photographs of the protest were published in an edition of the newspaper. The police began a criminal investigation of the incident, and hoped to find at the Stanford Daily more photographic evidence identifying the assaulting protesters. While none of the Stanford Daily staff were suspects, they were hostile to the police investigation. Because the newspaper was uncooperative, when police wanted access to the photographs, they used a search warrant to get them, and in the process, thoroughly searched the newspaper's office.

The Stanford Daily filed suit in the United States District Court for the Northern District of California under 42 U.S.C. § 1983, claiming that the Palo Alto police force, the district attorney, and the magistrate who had issued the warrant violated their First, Fourth, and Fourteenth Amendment rights. The district court agreed, and granted declaratory relief.

The district court held that a subpoena was always preferable

42. See id. at 556.
43. See id. at 550-51.
44. See id.
45. See id. at 551. The Court reported the following:
[T]he warrant issued on a finding of “just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily].” Id. (alteration in original) (quoting Appellate Brief at 31-32).
46. See id.
47. See id. at 568 n.1 (Powell, J., concurring). “[The newspaper] had announced [a] policy of destroying any photographs that might aid prosecution of protesters.” Id.
48. See id. at 551-52.
49. 42 U.S.C. § 1983 (1994). The text of § 1983 provides the following:
Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Id.
50. See Zurcher, 436 U.S. at 552.
to a warrant in seeking evidence from a third party not suspected of a crime in a criminal investigation. Moreover, the majority ruled that extremely stringent standards must be applied where a non-suspect newspaper was the object of the search, because First Amendment issues were implicated. The court further held that a search warrant should be issued only if a sworn affidavit indicated that a subpoena would be impractical. Therefore, the district court stated that search warrants would be acceptable “only in the rare circumstance where there is a clear showing that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile.” The United States Court of Appeals for the Ninth Circuit affirmed the lower court decision.

In reversing the court of appeals, the Supreme Court stated that the Fourth Amendment does not provide any specific protection for the search of non-suspects’ property over suspects’ property. Writing for the majority, Justice White stated that “[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.”

52. See id. at 130. See supra note 31 for a discussion of subpoenas and search warrants.

53. See Stanford Daily, 353 F. Supp. at 134. First Amendment protection of freedom of speech is threatened when confidential sources may be silenced for fear of exposure as a result of the search process. See id. The Supreme Court summarized the district court’s outline of the particular threats posed by third party searches of the press:

First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of information will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

Zurcher, 436 U.S. at 563-64.


55. Id. at 135.


57. See Zurcher, 436 U.S. at 554-55.

58. Id. at 556; see also id. at 556 n.6. In footnote six, Justice White cited numerous secondary sources supporting the view that the probable cause requirement relates to “the things” and not the potential guilt of the owner of the property. Id. at 556 n.6. He pointed out that the probable cause standard required for searches differs from the
Justice White asserted that in discussing search warrants, the Fourth Amendment does not distinguish between those who are suspected of a crime and those who are not, nor does it prescribe the use of subpoenas for non-suspects. In support of this conclusion, he examined both the California Penal Code and the ALI Model Code of Pre-Arraignment Procedure, which outline procedures for the procurement of search warrants at the state level, and found "no suggestion that the occupant of the place to be searched must himself be implicated in misconduct."

The Court concluded that the First Amendment implicated no special protection for the press under the Fourth Amendment. The drafters of the Constitution did not prohibit warrants of press premises, Justice White argued, and subsequent cases "do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." Justice White asserted that magistrates who abide by the Fourth Amendment's requirements for overall reasonableness and for the specificity of a search warrant request would preserve First Amendment rights.

probable cause standard required for arrest of a suspect. See id. In granting a search warrant request, a magistrate must agree that there is probable cause to believe that "criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted." Id. (quoting Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 358 (1974)).

59. See id. at 558.

60. See id. at 558 n.7. Justice White noted that in California, fruits, instrumentalities and evidence of crime "'may be taken on the warrant from any place, or from any person in whose possession [they] may be.'" Id. (citing CAL. PENAL CODE ANN. § 1524 (West 1970)).

61. See id. at 559. Justice White cited the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1(3)(Proposed Official Draft 1975), which provides that the warrant application

shall describe with particularity the individuals or places to be searched and the individuals or things to be seized, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such individuals or things are or will be in the places, or the things are or will be in possession of the individuals, to be searched. Zurcher, 436 U.S. at 559 (quoting § 220.1(3)). The Model Code of Pre-Arraignment Procedure was created by American legal scholars as a tool for drafting codes at the state level.


63. Id. at 565.

64. See id. at 565-66. Justice White placed his faith in the neutral magistrate to put First Amendment considerations into the "reasonableness" requirement. Id. But see infra note 228, which provides statistics showing an apparent lack of scrutiny on the part of federal magistrates, for example, in reviewing warrant applications.

For an argument expounding on the premier role of reasonableness in the Fourth
In the conclusion of the opinion, the Court issued a challenge to Congress by stating, "[o]f course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure."65

2. The Public Response to Zurcher

The response of the press to the Zurcher decision was strong and loud.66 Numerous articles were written about the chilling effect the decision would have on the ability of the press to do its job effectively.67 This fear was supported by the fact that while relatively few search warrants of press sites had been issued in the past, the number increased in the years following the Stanford Daily search.68 Journalists reported that confidential sources would dis-
appear because of fear of exposure through search procedures.  

In addition, members of the press were skeptical that the "neutral magistrate" issuing warrants on the basis of probable cause was truly neutral. The displeasure with the Zurcher decision was based not only on the perception that Fourth Amendment protection had been diminished, but on the perception that magistrates, often elected officials at the state and local levels, and not even necessarily attorneys, were in fact often political allies of the law enforcement agencies. The Zurcher decision, and Justice White's challenge, prompted a swift congressional response.

II. The Privacy Protection Act of 1980

Within two weeks of the Zurcher decision, the House and Senate began subcommittee hearings on the topic of protecting third party non-suspects from searches by law enforcement officers involved in criminal investigations. President Jimmy Carter asked members of his administration, primarily officials in the Department of Justice, to begin drafting privacy protection legislation. During the hearings, the committee heard testimony from media representatives who expressed concern about the implications of the Zurcher decision on their ability to perform their traditional role as watchdogs of government.

Professors Teeter and Singer quote from a memo by a Boston Globe editor, about a conversation which took place three weeks after the Zurcher decision, wherein a confidential source implied to the Globe that he was unlikely to call again because he feared that his anonymity was no longer protected. See id. (quoting Memorandum from Religion Editor, The Boston Globe, to Robert L. Healy, Executive Editor, The Boston Globe).

In addition, press executives immediately developed strategies for coping with unannounced searches. For example, an attorney for the Gannett Company circulated a memorandum to each of the company's seventy eight newspapers recommending procedures to be adopted in the event of an unannounced search, including cooperating, to minimize risk of rummaging through private files, and gathering the names of judges likely to grant reversal of warrants. See id. at 863 (quoting Memorandum from Douglas H. McCorkindale, Senior Vice President, Finance and Law, The Gannett Co., Inc., Warranted Searches of Newspaper Offices (June 13, 1978)).


71. See Teeter & Singer, supra note 31, at 857-59. Teeter and Singer quote Bill Monroe, NBC News Correspondent, as having expressed doubt whether there was "dependable protection in the restraint of judges and law enforcement officials." Id. at 858 (quoting Congress Moves on 13 Bills to Limit Searches, NEWS MEDIA & THE LAW, Oct. 1978, at 19). In addition, they quote Jack C. Landau's statement before the Senate Judiciary Committee, that "politically appointed or elected magistrates are not an adequate safeguard for the First Amendment interests of press organizations whose historical function is to expose the corruption and misdeeds of the very political structure of which the local magistrate is an integral part." Id. at 859.


73. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66.
ment of Justice, to study the issue and draft a bill.\textsuperscript{74}

A. The Enactment of the Privacy Protection Act

During the 1978-79 session, members of Congress introduced nineteen third party search warrant protection bills.\textsuperscript{75} By March of 1980, the Senate Committee on the Judiciary held hearings on three Senate bills and discussed one House bill.\textsuperscript{76} While all the bills established a subpoena-first rule for instances in which materials needed for criminal investigation were in the hands of non-suspect third parties, they differed in detail. Some notable differences in the bills introduced included provisions protecting all non-suspect third parties\textsuperscript{77} (the Privacy Protection Act protects only those involved in First Amendment activities), provisions for an exclusionary rule\textsuperscript{78} (the Privacy Protection Act explicitly rejects use of the exclusionary rule), and provisions requiring a law enforcement officer to articulate to a magistrate the reasons a warrant was sought (the Privacy Protection Act has no such provision).\textsuperscript{79}

\textsuperscript{74} See Privacy Protection Act: Hearing on S. 115, S. 1790, and S. 1816 Before the Senate Comm. on the Judiciary, 96th Cong. 50 (1980) (statement of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice) [hereinafter Senate Judiciary Comm. Hearings]; 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 329 (testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice).

\textsuperscript{75} See Erburu, supra note 67, at 154 n.13 (listing the nineteen bills introduced in 1978).

\textsuperscript{76} The bills considered were S. 115, S. 1790, S. 1816, and H.R. 3486. See Senate Judiciary Comm. Hearings, supra note 74, at 3 (opening statement of Senator Edward M. Kennedy, Chairman, Committee on the Judiciary).

\textsuperscript{77} For example, S. 1816, introduced by Senator Nelson, proposed to cover all non-suspect third parties. Under the terms of this bill, police needed to satisfy the higher standard of "probable cause" (rather than the "reasonable cause" required in other bills) that one of the exceptions to the subpoena-first requirement was met to justify the need for a warrant. See S. 1816, 96th Cong. § 3 (1980), reprinted in Senate Judiciary Comm. Hearings, supra note 74, at 27, 28.

\textsuperscript{78} A distinctive feature of S. 1816, described supra note 77, was its inclusion of an exclusionary rule, whereby evidence gathered not in accordance with the provisions of the bill was to be excluded at trial. See Senate Judiciary Comm. Hearings, supra note 74, at 28. The exclusionary rule was explicitly rejected in the final bill. See 42 U.S.C. § 2000aa-6(e) (1994) ("Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this chapter.")

\textsuperscript{79} Senator Charles Mathias, Jr., proposed S. 115, which would establish protection for "any matter," not just documentary material and work product, for all non-suspect third parties from searches by federal, state, and local officials. See S. 115, 96th Cong. (1980), reprinted in Senate Judiciary Comm. Hearings, supra note 74, at 12. Senator Mathias's bill contained explicit provisions requiring the officer to articulate to a judge or magistrate the reason a warrant was required. See id., reprinted in Senate Judiciary Comm. Hearings, supra note 74, at 13. The bill proposed the following:

The provisions of this Act do not prevent a judge or magistrate from issuing ex
The Privacy Protection Act of 1980 was signed by President Jimmy Carter on October 14, 1980. After debate over the competing but similar House and Senate bills, Congress adopted the bill drafted by President Carter's administrative team, with only minor changes. Congress concluded that the new law would cover only those parties involved in First Amendment-related activities, for which only the Justice Department had lobbied, rather than covering all non-suspect third parties, for which most constituents had lobbied. The drafters of the Act limited its application to this category of non-suspects for two reasons: first, they feared that a broader bill would be found unconstitutional and second, they

parte a warrant or other legal process to search for and seize... any matter in the possession or control of a third party in any case in which the applicant for the warrant... shows—

(a) upon his personal knowledge or that of another present before the judge or magistrate that there is probable cause to believe that if an order... is issued in accordance with subsection (b) of section 2 such matter will be destroyed, altered, or put beyond the control or the jurisdiction of the court... Id., reprinted in Senate Judiciary Comm. Hearings, supra note 74, at 13 (emphasis added). No action was taken on this bill, and none of its language appeared in the final version of the bill eventually adopted.


Drafters of the bill were confident that the Commerce Clause gave Congress the authority to pass legislation affecting those involved in First Amendment activities because published or broadcast materials regularly cross state lines. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 334. A broader set of protections, such as for all non-suspects, would have been based on the fifth section of the Fourteenth Amendment, which gives Congress the power to enforce, by the passage of laws, the provisions of the Fourteenth Amendment, such as the first clause, which says that no state can make or enforce any law that deprives any person of "life, liberty or property, without due process of law," or denies any person the "equal protection of the laws." U.S. CONST. amend. XIV, §§ 1, 5. Since the Supreme Court in Zurcher had
feared that the broader category would require the inclusion of more exceptions, or would jeopardize law enforcement efforts.84

The fundamental premise of the Act was that the subpoena, a less intrusive means of obtaining evidence, offered better protection of innocent parties than the search warrant.85 Thus, under the Act, when dealing with non-suspects who had information which was to be disseminated to the public, law enforcement officers must use a subpoena in all but a few instances when seeking evidence in a criminal investigation.86

Under the Act, criminal investigators seeking information from "a person reasonably believed to have a purpose to disseminate to the public . . . [some] form of public communication"87 must obtain a subpoena instead of a search warrant unless one of six stated exceptions applies.88 The Carter Administration drafters carefully said the use of search warrants for non-suspects was constitutional, the Justice Department argued strenuously that Congress could not justify the Privacy Protection Act on the grounds that it enforced the constitutional rights of citizens. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 333-34.

For a recent Supreme Court decision validating this argument, see City of Boerne v. Flores, 117 S. Ct. 2157 (1997), where the Court ruled that the Religious Freedom Restoration Act prohibited state actions that were constitutional under the Court's interpretation of the First Amendment Free Exercise clause, and thus exceeded the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment. See id. at 2170-72.

84. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 334. Philip Heymann, Assistant Attorney General for the United States Department of Justice, Criminal Division, and primary drafter of the bill, in his testimony to the Subcommittee on the Constitution, Committee on the Judiciary, stated the following:

With a broad third party bill, there is a requirement for a broad exception category . . . . The problem has always been . . . that most third parties who might be searched will be brothers or sisters, parents or children, friends or lovers, associates or accomplices of the suspect. With all those categories, it is almost impossible to judge whether there is a likelihood that the evidence would be destroyed.

We are afraid that the protection offered would be either illusory or far too extensive. It would be illusory if the magistrate were prepared to accept the conclusion that a brother is likely to destroy evidence held against his brother or a father will not deliver evidence subpoenaed [sic] for use against his son. I think those are reasonable conclusions.

If a magistrate would accept those conclusions, then a broad third-party bill would have practically no impact because everything would be in the exception category.

Id.


88. See id. § 2000aa(a)-(b). The exceptions in the case of documentary materials
crafted the language of the Act to protect a broad spectrum of First Amendment activities, but did not protect all third party non-suspects. While the Act does specify that exceptions to the subpoena-first rule exist, it does not specify whether the investigator or

are as follows: 1) if there is probable cause to believe the possessor of the materials sought is involved in the commission of the crime, or 2) if there is reason to believe that the immediate seizure of the materials is necessary to prevent death or serious bodily harm, 3) when there is reason to believe that the use of a subpoena would result in the destruction of the materials sought, and 4) if materials sought through the use of a subpoena are not produced. If the information takes the form of work product, then exceptions are 5) if there is probable cause to believe the possessor of the materials sought is involved in the commission of the crime, or 6) if there is reason to believe that the immediate seizure of the materials is necessary to prevent death or serious bodily harm. See id. In addition, the Act makes clear that it is not meant to impair customs and border searches. See id. § 2000aa-5.

42 U.S.c. § 2000aa-7(a)-(b) provides key definitions, including definitions of "documentary materials" and "work product":

(a) 'Documentary materials', as used in this chapter, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magentically [sic] or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) 'Work product materials', as used in this chapter, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;
(2) are possessed for the purposes of communicating such materials to the public; and
(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

Id. (footnote omitted).

89. The Act provides protection to people with an intent to disseminate information to the public. See id. § 2000aa; see also 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 331 (testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice, regarding the language of the proposal drafted by the Department of Justice which was subsequently utilized in the drafting of the bill). Heymann stated the following:

The heart of our proposal is the notion that the work product of reporters, lonely scholars, and the famous lonely pamphleteer deserves to be protected against Government seizure. It is a protection that goes beyond the organized and established press. It goes beyond the large press. We anticipate a protection that goes to anybody who is preparing papers, tapes, or photographs for dissemination to the public.

Id.
the warrant-issuing magistrate decides that one of the exceptions has been met.

The Act creates a civil action for those who find themselves subject to a search warrant in violation of the Act.90 There is a civil remedy for violations of the Act's provisions, with minimum damages of one thousand dollars.91 Any official sued in his or her individual capacity has a complete "good faith defense" available if the officer or employee "had a reasonable good faith belief in the lawfulness of his conduct."92 The Act specifically grants full immunity from liability to magistrates issuing warrants under the Act.93

In the final section of the Act, Congress ordered that the Justice Department develop guidelines for federal agents to use subpoenas for most non-suspects in addition to third parties engaged in First Amendment activities. This final section provides the standards that the Department of Justice was to use in its development of guidelines for federal agents when seeking investigative material from the broader class of non-suspect third parties.94 The Act required the development of guidelines for federal agent proce-

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90. See 42 U.S.C. § 2000aa-6(a)-(h).
91. See id. § 2000aa-6(a), (f). In addition, under this section, a person may sue any governmental unit, which is liable for actions of employees acting within the scope of their employment. Government employees may be sued individually if a state has not waived its sovereign immunity under its constitution. See id. § 2000aa-6(a)(2).
92. Id. § 2000aa-6(b). Section 2000aa-6(c) specifically disallows a good faith defense for governmental units.
93. See id. § 2000aa-6(c). This provision seems to codify common law immunity available to judges and magistrates.
94. See id. § 2000aa-11 to -12. Section 2000aa-11 provides the following:
(a) Procedures to obtain documentary evidence; protection of certain privacy interests

The Attorney General shall, within six months . . . issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person . . . not reasonably believed to be a suspect in such offense . . . . The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;
(2) a requirement that the least intrusive method . . . of obtaining such materials be used . . .
(3) a recognition of special concern for privacy interests . . . between clergyman and parishioner; lawyer and client; or doctor and patient; and
(4) a requirement that an application for a warrant to conduct a search governed by this subchapter be approved by an attorney for the government . . . .

Id. § 2000aa-11.
dures in situations such as attorney-client and doctor-patient relationships.95

In hearings and in the Senate Report, members of Congress expressed the hope that state and local governments would use the guidelines created by the Justice Department to create parallel procedures at the state and local level, which Congress felt it could not constitutionally mandate.96 Thus, the Privacy Protection Act does not clearly delineate procedural standards at the state or local level, nor does it demand the development of broader parameters for subpoena-first directives at the state or local level.

B. Attorney General's Guidelines

In 1981, the Justice Department issued its "Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties" ("Guidelines") in response to Congress' directive in the Privacy Protection Act.97 The Guidelines direct federal agents to obtain authorization from a Deputy Assistant Attorney General or other high official in the Department of Justice before a warrant, instead of a subpoena, can be sought.98 This process is triggered whenever evidence relevant to a criminal investigation is in the hands of a non-suspect. Agents must submit to a government attorney a description of the facts and circumstances which serve as their basis in seeking a warrant rather than a subpoena.99 Additionally, the Guidelines provide a list of considerations which a Deputy Assistant Attorney General must use to determine whether a request for a warrant is appropriate.100 Only after obtaining authorization from an appropriate Deputy Assistant Attorney General may a federal agent seek a warrant from a federal magistrate.101 Thus, under the Guidelines, a federal agent must expressly overcome the De-

95. See id. § 2000aa-11. The Act did not require that federal regulations give the subpoena-first preference to relatives of suspects.
98. See id. § 59.4(b)(2).
99. See id. § 59.4(b)(3).
100. See id. § 59.4(c). Section 59.4(c), entitled "Considerations bearing on choice of methods," suggests that the primary concerns are whether the materials sought are in danger of becoming unavailable absent the use of a search warrant and the urgency of the government's need for the materials. Id. These considerations parallel those in the Privacy Protection Act.
101. See id. § 59.4(a)(2).
partment of Justice’s presumption in favor of a subpoena in order to secure permission to seek a warrant from a magistrate.

The next part of this Note discusses the United States Court of Appeals for the Eighth Circuit’s interpretation of provisions of the Privacy Protection Act and the congressionally mandated federal guidelines in *Citicasters v. McCaskill*.

In *Citicasters*, the majority and dissenting opinions highlight different interpretations of the purpose and provisions of the Act concerning the role of the magistrate in authorizing a search warrant. The majority and dissent each interpret the statute’s silence regarding procedural matters, but arrive at opposing conclusions.

### III. *Citicasters v. McCaskill*

#### A. Facts of the Case

In 1994, a tourist filming the sights of Kansas City, Missouri inadvertently videotaped the abduction of a woman. He sold a copy of the tape to WDAF, a local television station, when he learned that the woman had been found murdered. After seeing a clip from the videotape on the evening news, the police requested a copy of the tape from the television station. The station refused to release anything but the portion aired on the news for the police’s criminal investigation unless the police obtained a subpoena, as required by the Privacy Protection Act of 1980. Due to problems of timing, a subpoena was not available and the police obtained a search warrant instead.

102. 89 F.3d 1350 (8th Cir. 1996).
103. *See id.* at 1350, 1357 (Bright, J., concurring in part and dissenting in part).
104. 89 F.3d 1350 (8th Cir. 1996).
106. *See Citicasters*, 89 F.3d at 1352.
107. *See id.*
108. *See id.* Neither the district court nor the court of appeals opinions indicate why the station was unwilling to voluntarily release the rest of the videotape. According to the facts of the case, the tourist who filmed the event was at the television station with his original videotape when the police arrived, but police were not informed of his presence there. In fact, the station manager appears to have intentionally misled the police by stating merely that the tourist would be home three days later. *See id.* at 1352 n.1.
109. *See Citicasters*, 883 F. Supp. at 1287. The police were unable to secure a subpoena because, under Missouri law, a subpoena is only available when an actual case is pending, and is not available at the investigatory stage of a proceeding. While a grand jury can order the issuance of a subpoena in its determination of probable cause for an indictment, in this instance the grand jury would not be sitting until a week after the time when the materials were sought. *See id.*
The police, in the company of Prosecuting Attorney Claire McCaskill, executed the search warrant at the station and obtained the tape. Subsequently, Citicasters, Inc., the station owner, sued the police and the County Prosecutor for violation of the Privacy Protection Act, as well as violation of 42 U.S.C. § 1983. Citicasters contended that the Privacy Protection Act required that the investigators specify, in their affidavit to the warrant-issuing magistrate, the exception(s) under which they justified the need for the search warrant.

B. District Court Opinion

The United States District Court for the Western District of Missouri held that the County Prosecutor had violated the Privacy Protection Act of 1980. The court found that the videotape was "documentary material" as defined by the Act, and thus subject to warrant exceptions. However, the district court agreed with Citicasters that, because the defendants had not specified in the search warrant the factual basis for the claimed exceptions, they were barred from claiming that the exceptions existed after the fact. To support this conclusion, the court asserted that granting law enforcement officials a warrant without requiring them to state under which exception to the Act the warrant was sought would give law enforcement officials an opportunity to retroactively justify their conduct.

The court found language in the legislative history of the Privacy Protection Act that implied that the magistrate was to consider Missouri's criminal procedures are not unusual, and this concern was mentioned by speakers at congressional hearings. See infra note 225 and accompanying text.

111. See id. at 1285.
112. See id. at 1288.
113. See id. at 1293.
114. Id. at 1286. The court found that the tape was documentary material and dismissed the defendant's claim that the material was neither work product nor documentary material because it had not been possessed with intent to disseminate it to the public. In spite of the fact that the station was not planning to air the materials sought, the court took note of the fact that the Privacy Protection Act grew out of Zurcher v. Stanford Daily, 436 U.S. 547 (1978), where similarly, the materials sought were not going to be published. See Citicasters, 883 F. Supp. at 1286-87. For a discussion of the Zurcher case, see supra Part I.B. The court, in Citicasters, interpreted the statute to cover all "materials . . . connected with a public communication." Citicasters, 883 F. Supp. at 1287. See supra note 87 and accompanying text for the relevant language of the Privacy Protection Act.
116. See id.
the exceptions under which the warrant was sought at the time of
granting or refusing the warrant. The court concluded that Con­
gress envisioned that a law enforcement agent would articulate the
basis for the exception when applying for the warrant, and that the
neutral magistrate would review the basis for the exception in eval­
uating the need for a search warrant.

While the district court denied an injunction requested by Citi­
casters, in finding for the station it granted the minimal civil rem­
eyed prescribed by the Act, damages of $1,000.

C. Court of Appeals Opinion

The United States Court of Appeals for the Eighth Circuit re­
versed the lower court and held that a government agent does not
have to state the reasons supporting an exception to the Privacy
Protection Act in the affidavit for the search warrant. In so rul­
ing, the court remanded the case to the district court to give the
defendant, County Prosecutor Claire McCaskill, the opportunity to
show that "the exceptions claimed in fact existed," or that she
"possessed a reasonable belief that an exception to the Privacy Pro­
tection Act existed." The dissent argued that Congress had as­
sumed that government agents would have to state the reasons
supporting an exception to the Act in the affidavit for the search
warrant.

117. See id. The Senate conference report noted that exceptions were "factors to
be 'considered by a magistrate.'" Id. (citing S. REP. NO 96-874, at 13 (1980), reprinted in

118. See id.

119. See id. at 1289-90. Citicasters sought an injunction requiring the police to
return to Citicasters its copy of the videotape. See id. at 1289. In addition, it wished the
injunction to state that the law enforcement officials were prohibited from seizing any
documentary materials from Citicasters in the future "except in accordance with law." Id.
The court did order that the tape be returned to the plaintiff, but refused the claim
for future injunctive relief under the Privacy Protection Act as well as under 42 U.S.C.
§ 1983, the other statute under which relief was sought and denied. The injunction was
denied because the plaintiff failed to provide any evidence of a threat of future seizure.
See id. at 1290.

120. See id. at 1292.

121. Citicasters v. McCaskill, 89 F.3d 1350 (8th Cir. 1996).

122. See id. at 1356.

123. Id.

124. Id. at 1357 (referring to one of the affirmative defenses of the Act). See
supra text accompanying note 92 for the relevant language of the Privacy Protection
Act.

125. See Citicasters, 89 F.3d at 1358-59 (Bright, J., concurring in part and dissent­
ing in part).
1. Majority Opinion

To begin its analysis, the court reviewed the district court's interpretation of the Act.\textsuperscript{126} Noting that the district court had reached its conclusion by analyzing legislative history,\textsuperscript{127} the Eighth Circuit first turned to the text of the Act to determine whether use of legislative history was warranted.\textsuperscript{128}

In interpreting the text of the Privacy Protection Act, the Eighth Circuit held that the language was clear and unambiguous.\textsuperscript{129} Because of this, the majority stated that an examination of the legislative history was unnecessary.\textsuperscript{130} To support this conclusion, the Eighth Circuit noted the following:

\begin{quote}
[I]t is a fundamental canon of statutory interpretation that "we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress.'"\textsuperscript{131}
\end{quote}

The Eighth Circuit examined the text of the Act and determined that there were places where Congress specifically prescribed procedures for law enforcement officers to follow in order to comply with the Act.\textsuperscript{132} Thus, the majority concluded that the absence of procedural prescriptions concerning search warrant applications was deliberate.\textsuperscript{133} Judge Magill, writing for the majority, wrote the following:

\begin{quote}
Indeed, we note that Congress did choose to somewhat modify the search warrant application process in other circumstances. See 42 U.S.C. § 2000aa(c) (where 42 U.S.C. § 2000aa(b)(4)(B) exception applies, person possessing materials may submit an affidavit contesting issuance of warrant)." \textit{Id.}

The Court noted that the Act provides an opportunity for the individual holding materials sought by the law enforcement officers to challenge the use of a search warrant through the use of an affidavit. \textit{See id.; see also} 42 U.S.C. § 2000aa(c) (1994 & Supp. II 1996).
\end{quote}

\begin{itemize}
\item \textsuperscript{126} See \textit{id.} at 1354.
\item \textsuperscript{127} See \textit{id.}
\item \textsuperscript{128} See \textit{id.}
\item \textsuperscript{129} See \textit{id.}
\item \textsuperscript{130} See \textit{id.}
\item \textsuperscript{132} See \textit{id.} at 1355 n.6. The court stated, "Indeed, we note that Congress did choose to somewhat modify the search warrant application process in other circumstances. See 42 U.S.C. § 2000aa(c) (where 42 U.S.C. § 2000aa(b)(4)(B) exception applies, person possessing materials may submit an affidavit contesting issuance of warrant)." \textit{Id.}
\item \textsuperscript{133} See \textit{id.} The Court noted that the Act provides an opportunity for the individual holding materials sought by the law enforcement officers to challenge the use of a search warrant through the use of an affidavit. \textit{See id.; see also} 42 U.S.C. § 2000aa(c) (1994 & Supp. II 1996).
\end{itemize}
That Congress did not choose to substantially interfere with the procedures by which state judicial officers issue search warrants to state law enforcement officials more likely reflects, in our view, congressional appreciation of the proper restraints of federalism, rather than congressional ineptitude in drafting the legislation that it intends.134

As further support for its conclusion that the government does not have to list the exception enumerated in the Act in its warrant application, the court held that Congress intended the remedy of damages to be the enforcement tool rather than "elaborate procedural requirements."135 In addition, the court referenced the United States Attorney General's Guidelines for seeking search warrants on any non-suspect third party.136 The Guidelines require the federal agent to explicitly consider whether circumstances justify the request for a warrant.137 Under the Guidelines, the federal agent is not directed to document her reasons for seeking a search warrant in the affidavit to the magistrate.138 Therefore, the court concluded, Congress not only intended to leave procedural details out of the Privacy Protection Act, but intended that the search warrant decision-making process be left solely in the hands of the law enforcement agency.139

2. Judge Bright's Dissent

Judge Bright supported the district court decision and dissented in part from the majority opinion.140 In contrast to the majority, he concluded that the language of the Act did not clarify the confusion regarding whether the magistrate had a role in deciding whether one of the exceptions to the Act had been met. Consequently, Judge Bright relied on the legislative history of the Privacy

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134. Citicasters, 89 F.3d at 1355 n.6.
135. Id. at 1355.
136. See id. at 1354 n.5 (citing 28 C.F.R. §§ 59.1-.6 (1995)). See supra note 97 and accompanying text for a discussion of the guidelines promulgated as a result of the Privacy Protection Act.
137. See Citicasters, 89 F.3d at 1354 n.5.
138. See id.; see also 28 C.F.R. § 59.4(a)(2) (1997); supra note 94 and accompanying text.
139. See Citicasters, 89 F.3d at 1354 n.5, 1355.
140. See id. at 1357 (Bright, J., concurring in part and dissenting in part). Judge Bright concurred with the majority on its decision to remand the case to the district court to resolve the issue of whether County Prosecutor McCaskill had participated in the search and seizure, and to resolve a disputed issue between the parties as to whether it was the original or a copy of the videotape that had been returned by police to Citicasters. See id. (Bright, J., concurring in part and dissenting in part).
Protection Act to determine the intent of Congress.\footnote{See id. at 1357-58 (Bright, J., concurring in part and dissenting in part).}

Judge Bright's analysis, like that of the majority, began with the language of the statute. He noted that the Act specifically listed the available exceptions to the requirement for a subpoena when seeking evidence from a non-suspect engaged in First Amendment activities, and required "reason to believe" that one of the exceptions applied.\footnote{Id. at 1357 (Bright, J., concurring in part and dissenting in part) (quoting 42 U.S.C. § 2000aa(b) (1994)).} He further noted that the statute does not denote whether it is the magistrate or the government agent who must have "reason to believe."\footnote{Id. (Bright, J., concurring in part and dissenting in part) (quoting 42 U.S.C. § 2000aa(b) (1994)).} However, unlike the majority, Judge Bright did not find the statute's silence on the procedural issues, when substantive issues were so explicitly stated, to provide a clear directive.\footnote{See id. at 1357-58 (Bright, J., concurring in part and dissenting in part) ("Although the majority opinion explains that the language of the statute is not ambiguous, it is the absence of procedural requirements rather than any ambiguity that is crucial in deciding this case . . . . It is this absence of a statutory directive which faces us here.").} Instead, he concluded that the absence of procedural guidelines was "crucial in deciding this case."\footnote{Id. at 1357 (Bright, J., concurring in part and dissenting in part).} As support for his conclusion, he noted that if Congress failed to address an issue in a given statute, it is appropriate to look at the legislative history,\footnote{See id. at 1358 (Bright, J., concurring in part and dissenting in part) (citing Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 611-12 n.4 (1991); Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1440 (8th Cir. 1993) (en banc)).} the circumstances surrounding the enactment,\footnote{See id. (Bright, J., concurring in part and dissenting in part) (citing Security Bank Minn. v. Commissioner, 994 F.2d 432, 436 (8th Cir. 1993)).} judicial concepts at the time the law was enacted,\footnote{See id. (Bright, J., concurring in part and dissenting in part) (citing Estate of Wood v. Commissioner, 909 F.2d 1155, 1160 (8th Cir. 1990); Stillians v. Iowa, 843 F.2d 276, 280 (8th Cir. 1988)).} and the overall purpose of the act\footnote{See id. (Bright, J., concurring in part and dissenting in part) (citing In re Graven, 936 F.2d 378, 385 (8th Cir. 1991)).} for clarification.

Turning first to the circumstances surrounding the enactment, Judge Bright concluded that since the \textit{Zurcher v. Stanford Daily}\footnote{436 U.S. 547 (1978). See \textit{supra} Part I.B.1 for a discussion of the \textit{Zurcher} case.} prompted Congress to act, the court of appeals should look to the search warrant procedures described in \textit{Zurcher}, and assume that Congress would leave these procedural standards intact unless it...
stated specifically otherwise.\textsuperscript{151} To this end, Judge Bright found that both the majority and dissent in \textit{Zurcher} indicated that the magistrate carried the burden of deciding whether the appropriate circumstances existed to support the issuance of a warrant.\textsuperscript{152} Although Judge Bright acknowledged that the magistrate's decision-making role was not the focus of \textit{Zurcher}, he asserted that both the majority and dissenting opinions in that case did not question the procedures described.\textsuperscript{153} Therefore, since the Senate Report of the Act's legislative history stated that the Privacy Protection Act was enacted in response to \textit{Zurcher}, Judge Bright concluded that "Congress envisioned the procedural framework to remain intact."\textsuperscript{154} Thus, the dissent asserted, Congress assumed that the applicability of the Act's exceptions would be evaluated by a magistrate prior to issuing the warrant.

Next, the dissent examined the Act's legislative history to find evidence of specific congressional thinking or assumptions regarding whether officers must articulate which Privacy Protection Act exception was applicable in the search warrant application to the magistrate.\textsuperscript{155} Judge Bright concluded that two parts of the legislative history demonstrated that Congress expected such a procedure. First, the Senate Report recites a number of factors that "the Committee believes might be considered by a magistrate"\textsuperscript{156} when deciding whether documentary materials can be obtained by a search.
warrant. Second, comments by Senators Orrin Hatch and Alan Simpson in the Senate Report make specific reference to the decision-making role of magistrates in the Act. Judge Bright concluded from the Senate Report that the magistrate should specifically rule on the issuance of the warrant based on the adequacy of the exceptions stated.

In addition, Judge Bright focused on Congress' recognition that the Act grew from the Fourth Amendment, and was created to specifically bolster the Fourth Amendment's inadequate protection for non-suspects engaged in First Amendment activities. With this constitutional principle as a foundation, he examined prior Fourth Amendment decisions to analyze the role of magistrates in search and seizure matters. The primary function of magistrates, according to Supreme Court precedent, is to neutrally evaluate the quality and quantity of evidence gathered by law enforcement officers and to determine whether it is "sufficient to justify invasion of a citizen's private premises." The dissent noted that the Supreme Court has observed that Fourth Amendment protections are ensured by requiring that probable cause determinations are made by a neutral magistrate, not an "officer engaged in the often competitive enterprise of ferreting out crime." From this description of proper warrant procedure under the Fourth Amendment, Judge Bright concluded that a government agent seeking a warrant instead of a subpoena must articulate which exception to the Act would justify a magistrate's decision to issue a warrant.

As his final point in dissent, Judge Bright stated that the purpose of the Privacy Protection Act was to prevent unreasonable searches and seizures. He argued that to allow after-the-fact justification of search warrant issuance by the law enforcement agent "pulls the teeth out of the statute" by removing the protective pre-search screen of the neutral magistrate. Furthermore, while the
Act provides a civil remedy for violations of the protection afforded under the Privacy Protection Act, Judge Bright implied that the remedy of damages was not sufficient to successfully prevent searches and seizures of the press.\textsuperscript{166} Therefore, if the purpose of the Act is to prevent unnecessary searches and seizures, and the remedy of damages does not guarantee the fulfillment of that purpose, Judge Bright concluded that Congress assumed that it was imposing on the magistrate a procedural mandate to determine that a warrant was appropriate under the terms of the Privacy Protection Act.\textsuperscript{167}

\section*{IV. Legal Analysis}

In \textit{Citicasters}, both the majority and the dissent analyzed the Privacy Protection Act and interpreted the intent of Congress in their analyses. The majority, looking at the language of the Act, believed that Congress intentionally refrained from imposing procedures on state and local law enforcement officers in light of Tenth Amendment\textsuperscript{168} considerations, or in Judge Magill's words, in light of "the proper restraints of federalism."\textsuperscript{169} The dissent, looking beyond the language of the Act, believed that Congress assumed that the procedures in question were a part of the warrant-seeking process, since the Act was meant to bolster constraints on law enforcement investigations involving non-suspects engaged in First Amendment activities.\textsuperscript{170} In part, both opinions relied on principles of statutory interpretation.\textsuperscript{171} Judge Magill, in the majority

\textsuperscript{166} See id. (Bright, J., concurring in part and dissenting in part).

\textsuperscript{167} See id. (Bright, J., concurring in part and dissenting in part).

\textsuperscript{168} The Tenth Amendment of the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

\textsuperscript{169} \textit{Citicasters}, 89 F.3d at 1355 n.6. See supra text accompanying note 134 for the majority's language. See infra Part IV.B.5 for a discussion of Tenth Amendment issues.

\textsuperscript{170} See \textit{Citicasters}, 89 F.3d at 1359 (Bright, J., concurring in part and dissenting in part). See supra Part III.C.2 for a discussion of Judge Bright's dissent.

\textsuperscript{171} It is beyond the scope of this Note to discuss the range of theories of statutory interpretation used by courts in their analyses of statutes. For a summary of the prevailing theories, see Laura C. Edmonds, Note, The Fair Labor Standards Act—Anti-
opinion, stated his opposition to an exploration of the legislative history if it could be avoided, and decided that in this case it could. Judge Bright, in his dissenting opinion, stated that the absence of procedural directives in the Act required a look at the statutory history and surrounding circumstances.

This Note asserts that the majority's interpretation of the statute is correct, but that the statute, even with this interpretation, may violate the Tenth Amendment. The dissent's interpretation of the Act's silence may better accomplish Congress' stated goals in passing the Act, but it imposes the federal hand into traditional state police powers without explicit directives from Congress and in violation of the Tenth Amendment. While the Privacy Protection Act may be ineffective without the procedural requirement that a magistrate rule on stated exceptions to the Act, because of constitutional considerations embodied in the Tenth Amendment, courts should refrain from inferring that Congress intended such procedures.

A. **Effective Enhancement of First and Fourth Amendment Rights: Evidence Showing that Judge Bright is (Partly) Right**

Judge Bright's primary concern in his *Citicasters* dissent was that the majority's interpretation of the Privacy Protection Act undermined the Act's effectiveness in preventing the use of search warrants when evidence was in the hands of non-suspects engaged in First Amendment activities. Judge Bright concluded that the Act's silence regarding the contested procedural issue was not intentional, but rather that Congress had neglected to outline the magistrate's responsibilities in sufficient detail. This section ex-

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172. See *Citicasters*, 89 F.3d at 1354-55. See supra notes 129-31 and accompanying text for a discussion of the majority's statements regarding statutory interpretation.

173. See *Citicasters*, 89 F.3d at 1357-58 (Bright, J., concurring in part and dissenting in part). See supra note 144 and accompanying text for Judge Bright's statutory analysis.

174. See *Citicasters*, 89 F.3d at 1357 (Bright, J., concurring in part and dissenting in part). While legislative inaction on an issue may be interpreted as evidence of legislative intent, silence about an issue can not be interpreted as inaction unless one knows that the issue was discussed and dropped or not acted upon in some way. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 246-48 (1994).
amines Judge Bright’s rationale for his conclusion, and argues that his concerns regarding congressional intent can be validated by an examination of the Zurcher case, which inspired the Act, and other issues discussed in the Act’s legislative history.

1. Silence as an Ambiguity

Judge Bright justified his examination of the legislative history of the Privacy Protection Act and the contextual setting that prompted its passage by saying that there was an “absence of procedural requirement[s]” in the Act that made the magistrate’s precise role in the process unclear.175 His subsequent approach to the interpretation of this “absence” in the statute was to assume that he must look to the Act’s legislative history to discern what Congress may have intended.

Courts regularly assume that silence in an act is intentional, which results in an assumption that an issue that is not addressed is intentionally not addressed.176 In some instances, however, courts may assume that silence in an act reflects an unconsidered or neglected issue resulting in an ambiguity, which results in an examination of other sources to determine probable congressional intent.177 If a court determines that a section of a statute is ambiguous, it will next conduct an analysis of the entire statute, its legislative history, and in some circumstances, as with Judge Bright, the context from which the statute emerged, in an attempt to discern its intended meaning.178

175. Citicasters, 89 F.3d at 1357-58 (Bright, J., concurring in part and dissenting in part).

176. See infra Part IV.B.1 for a discussion of the Citicasters’ majority treatment of the absence of procedural provisions in the Privacy Protection Act as an intentional act of Congress.

177. This approach is not without its critics. See Judge Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol’y 59, 59 n.1 (1988) (praising Justice Scalia’s comment that it is inappropriate “to speculate upon what Congress would have said if it had spoken” in Lukhardt v. Reed, 107 S. Ct. 1807, 1812 n.3 (1987)); Daniel L. Rotenberg, Essay, Congressional Silence in the Supreme Court, 47 U. Miami L. Rev. 375, 378 (1992) (“A search for clarity in legislative records often proves difficult and sometimes futile. Application of this process to what Congress has not said in order to turn nothing into something that is attributable to Congress would assure a result based on either error or fiction.”).

178. Sometimes a court will look to other sources, even if the language of the statute is clear. See John C. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,” 64 B.U. L. Rev. 737 (1985). Grabow notes that in Jefferson County Pharmaceutical Ass’n, Inc. v. Abbott Laboratories, 460 U.S. 150, 157 (1983), the Court said, “[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the
The following sections expand on Judge Bright’s discussions of the context from which the Privacy Protection Act emerged, including the legislative history, and provide support for Judge Bright’s assertion that Congress was working from the assumption that a magistrate would rule on all issues of probable cause, including the belief that one of the exceptions to the Act established the need for a search warrant.

2. The Purpose of the Act—Protecting First and Enhancing Fourth Amendment Rights

a. The Zurcher context

Judge Bright pointed to the Zurcher Supreme Court opinion as evidence to support his construction of the Act. Additional support for his assertion comes from the district court opinion in Zurcher, which sets forth a subpoena-first directive as well as exceptions under which a search warrant might be appropriate when seeking materials from non-suspects. Significantly, the district court explicitly supported the affirmative role of the magistrate in making a determination that not only were the Fourth Amendment requirements of probable cause met, but also that urgent circumstances existed that justified issuing a warrant for a search for documentary materials on the premises of a press-related non-suspect. This framework provided a clear underpinning for the Act’s provisions, but also illustrates the possible assumptions regarding procedures.

b. The structure of the Privacy Protection Act

The dissent correctly stated that the overall purpose of the Privacy Protection Act, as a response to Zurcher, was to statutorily

Act.” Grabow, supra, at 739. In support of this proposition, Grabow also references Russello v. United States, 464 U.S. 16, 20 (1983) (“If the statutory language is unambiguous, in the absence of a ‘clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.’”). Grabow, supra, at 739 n.9.

179. See Citicasters, 89 F.3d at 1358 (Bright, J., concurring in part and dissenting in part). See supra Part III for a discussion of Citicasters, and supra Part I.B for a discussion of the Zurcher case.


181. See id. at 134. See supra notes 51-55 and accompanying text for a discussion of the district court opinion. The district court stated that search warrants should rarely be used with non-suspects, especially if First Amendment issues are implicated. The court further stated that if a law enforcement officer thought it was essential, a sworn affidavit must explicitly state that exigent circumstances precluded the use of a subpoena. See Stanford Daily, 353 F. Supp. at 132-35.
raise the standards of the Fourth Amendment to protect actions of those engaged in First Amendment activities. Without the dissent’s construction of the statute, the standard has been raised very little. The Act imposes a civil rather than a criminal penalty, and since the Act does not provide for punitive damages, such penalties will probably be minimal. There is a complete “good faith defense” available to law enforcement officers, which facilitates post hoc justification. Finally, there is complete judicial immunity, which means that regardless of the role of the magistrates, they bear no responsibility for properly enforcing the mandates of the Act.

Congress presumed that a search warrant is inferior to a subpoena in protecting innocent parties’ privacy. Therefore, it would be logical for Congress to structure the Act to effectively prevent the use of search warrants. By requiring the agreement of the neutral magistrate that an exception exists, it helps ensure first, that law enforcement officers are consciously aware of the need to comply with the subpoena-first presumption of the Privacy Protection Act, and second, that the inferior tool of the search warrant is used as infrequently as possible. This procedure helps ensure that free speech is not inhibited due to fear of unwarranted intrusions by police. When a non-suspect protected by the Privacy Protection Act is presented with a search warrant, the fact that the judge has issued it should be evidence that law enforcement officers have complied with the Act.


183. See 42 U.S.C. § 2000aa-6(a), (f) (1994); see also supra note 91 and accompanying text.

184. See 42 U.S.C. § 2000aa-6(b); see also supra note 92 and accompanying text.

185. See 42 U.S.C. § 2000aa-6(c). The provision for judicial immunity can be read to support either the majority or the dissent’s point of view. Under the majority’s construction of the statute, the judicial role is divorced from compliance with the Act, since the magistrate must merely rule on issues of probable cause. See supra Part III.C.1 for a discussion of the majority opinion. Under the dissent’s construction of the statute, magistrates are not held responsible for the stated “reasonable belief” of law enforcement officers that one of the exceptions exists, making clear that the Act is meant to modify the behavior of the police, not the judiciary. See supra Part III.C.2 for a discussion of the dissent’s opinion.


187. Under the facts of Citicasters, since a subpoena was not available in a timely fashion to the local police or the county prosecutor, the focus of the process was the perceived urgent need to get the videotape from the station in order to identify the
In addition to protecting rights of those engaged in First Amendment activities, the Privacy Protection Act also bolsters rights of private citizens beyond the protections provided by the Fourth Amendment, or alternatively, acts as a substantive constraint on law enforcement officers.\textsuperscript{188} Law enforcement officers, under the Fourth Amendment, must articulate "probable cause" by oath or affidavit in order to secure a warrant.\textsuperscript{189} Under the majority's construction of the Privacy Protection Act, there is no requirement that law enforcement officers articulate their "reasonable belief" or, in some cases, their "probable cause to believe" that the conditions of one of the exceptions exist.\textsuperscript{190} As Judge Bright points out, while law enforcement officers are required to develop a reasonable belief that one of the exceptions to the Act exists before they act, the only check on that belief is a civil suit instituted by an injured party after the act has occurred.\textsuperscript{191} As Judge Bright observed, this construction "pulls the teeth out of the statute."\textsuperscript{192} It is more effective, when trying to discourage certain actions and encourage others, to require proof that the preferred actions were considered contemporaneously with the event rather than to allow

\textsuperscript{188} See S. Rept. No. 96-874, at 1, 4-5, 9, reprinted in 1980 U.S.C.C.A.N. at 3950-51, 3955.

\textsuperscript{189} The "probable cause" standard, according to Justice White in Zurcher, was merely a showing of some belief that the fruits, instrumentalities, or evidence of a crime are located on the premises to be searched. See Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

\textsuperscript{190} See Citicasters, 89 F.3d at 1356, 1360 (Bright, J., concurring in part and dissenting in part). See supra note 88 and accompanying text for a discussion of the exceptions contained in 42 U.S.C. § 2000aa(a)-(b).

\textsuperscript{191} Law enforcement officers, if sued personally (as in Citicasters), are relieved of liability if they can show, after the fact, that they "reasonably believed" an exception to the Act existed. See 42 U.S.C. § 2000aa-6(b) (describing the availability of a "good faith defense"); see also Citicasters, 89 F.3d at 1357 (remanding the case to the district court to determine whether County Prosecutor McCaskill "possessed a reasonable belief that an exception to the Privacy Protection Act existed").

\textsuperscript{192} Citicasters, 89 F.3d at 1360 (Bright, J., concurring in part and dissenting in part).
justification for the actions actually taken to be developed after the event has occurred.

The impetus for the Privacy Protection Act was the Supreme Court's decision in Zurcher. In that context, there is evidence that the framework of the Act assumed an affirmative role for the magistrate. In addition, Judge Bright's observations correctly underscore that the majority's construction of the Act does not effectively solve the problems presented by the Court's ruling in Zurcher. Furthermore, the dissent found direct references to support this conclusion in the Act's legislative history.

3. The Legislative History of the Privacy Protection Act

The dissent in Citicasters noted that the Senate Report drafters appear to have assumed that a magistrate would rule both on the probable cause that the materials being sought would be found on the premises for which a warrant was requested, and on the officer's reasonable belief that one of the exceptions to the Privacy Protection Act applied. Judge Bright supported this conclusion by citing specific language in the Senate Report.

In fact, it is hard to know what was assumed and what was merely overlooked. The Act was not passed after a hard-fought

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194. See Citicasters, 89 F.3d at 1359 (Bright, J., concurring in part and dissenting in part). There are three places where the Senate Report drafters made the assumption that the Act addresses the obligations of law enforcement officers when seeking a warrant:

This statute recognizes this distinction [between suspects and non-suspects], but, in light of the importance of protecting First Amendment values, it places a heavy burden on law enforcement officers wishing to invoke the suspect exception . . . by requiring that they show probable cause to believe that the person possessing the materials has committed . . . the criminal offense for which the materials are sought.


"Among the factors which the [Senate Judiciary] Committee believes might be considered by a magistrate in determining whether materials might be destroyed are evidence of a close personal, family or business relationship between the person in possession of the material with a person who is a suspect . . . "  Id. at 13, reprinted in 1980 U.S.C.C.A.N. at 3959 (emphasis added). "The committee in adopting [the language of the Privacy Protection Act] is, in effect, instructing magistrates and others empowered to issue warrants that a search directed at the documentary materials of journalists is to be considered in itself "unreasonable" in the absence of enumerated circumstances." Id. at 22, reprinted in 1980 U.S.C.C.A.N. at 3968 (additional views of Senators Orrin Hatch and Alan Simpson).
battle, but had a great deal of consensus from the start. The principal conflict of its enactment was not over procedural issues, but concerned the circumstances under which the exceptions to the subpoena requirement would apply. There were relatively few discussions about procedures and they do not appear to have been controversial or contested. There was no discussion which would indicate Congress specifically intended that failure to articulate which exception was prompting a law enforcement officer to apply for a warrant would constitute a violation of the Act.

However, congressional hearings refer to procedural aspects of the Act. The principal drafter of the statute, Justice Department Assistant Attorney General Philip Heymann, stated in a hearing before the Senate Judiciary Committee that he envisioned a procedure where the investigator would specifically state, in the affidavit for the search warrant, which exception to the Privacy Protection Act applied. In this testimony, Heymann described exactly that which Judge Bright envisioned: a neutral magistrate or judge ruling on the law enforcement officer's stated exceptions to the Act.

In addition, testimony from interested parties during congressional hearings establishes that at least some readers of the bill assumed a magistrate would rule on the appropriateness of issuing the warrant under the Act. In an early hearing before the Senate

196. The issue of whether the Act should cover all third party non-suspects or just those involved in First Amendment issues was much contested and discussed. See id. at 8-9, reprinted in 1980 U.S.C.C.A.N. at 3954-55.
198. See Senate Judiciary Comm. Hearings, supra note 74, at 43-44 (statement of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice, in response to questions from bill sponsor Senator Max Baucus); see also infra note 199 and accompanying text.
199. Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice, stated the following at a Senate Committee on the Judiciary Hearing:

We would have to, if it were documents or work product of somebody holding them for future publication . . . numerate and give evidence of the particular exception that we were invoking. That would just be put in the affidavit.

The magistrate would either find that that was met or not. If the magistrate found that it was met, he or she would issue a warrant. Senate Judiciary Comm. Hearings, supra note 74, at 43-44 (excerpt to response from questions from Senator Max Baucus about the search warrant process envisioned at the Federal level). Heymann chaired a task force created at the order of President Carter to look into the administrative response to the Zurcher holding. Heymann wrote most of the language that was incorporated into the final bill. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 329 (testimony of Philip Heymann).

200. For example, in commenting on the bill that was passed, the National News-
Subcommittee on the Constitution, Sam Dash, Professor at Georgetown University Law Center, testified as follows:

[A]ll you are really doing is adding another element to the determination by a magistrate of probable cause . . . [I]n a situation involving an innocent third party . . . [the police] can go to a magistrate and make [the] case to a magistrate . . . [I]f he can get a magistrate to agree with him that there is reasonable ground to believe that the evidence might be destroyed, then you meet the requirements of the fourth amendment [sic]. I suggest that was absent in [Zurcher]. There was no such showing made before a magistrate.201

Professor Dash suggested that Zurcher was decided wrongly because there was no evidence that the police had, in their application for a search warrant, sought the warrant upon a showing of probable cause to believe that the evidence would be destroyed if a subpoena had been sought.202 At the same hearing, Senator Mathias submitted a set of questions which made it clear that he assumed a
magistrate would make the probable cause finding for both the place and particularity requirement of the Fourth Amendment, and for the reasons to be justified under the Privacy Protection Act—e.g., whether the evidence would be destroyed. 203 Finally, the three bills considered in the Senate Judiciary Committee differed in who was to be covered by the act. 204 One of the unsuccessful bills had an explicit provision that a magistrate would rule on exceptions articulated by the officer seeking a warrant. 205

In conclusion, in the relatively few places in which there was discussion of the issue of the role of the magistrate in the process of issuing a warrant as an exception to the Privacy Protection Act, members of Congress and other participants in the legislative process assumed that a magistrate would make the determination that an exception had been met. This evidence supports Judge Bright’s construction of the Act.

However, even with evidence that Congress and participants in the legislative process may have intended to provide an affirmative role for the magistrate in ensuring compliance with the Act’s directives, and with evidence that the dissent’s construction of the Act is a more effective method for ensuring the protection of First Amendment rights and enhancing Fourth Amendment rights, this Note asserts that the dissent’s foray beyond the language of the statute is inappropriate in this circumstance. First, there is ample evidence that Congress intended the majority’s construction of the Act. Second, even if the dissent’s evidence is compelling, when the unresolved issue involves federal intrusion into traditionally state-controlled activities, the courts should not impose duties on the states unless Congress has specifically so directed. Finally, under recent Supreme Court interpretation of the Tenth Amendment, the dissent’s interpretation of the statute is probably unconstitutional.

The dissent’s assertion that the Act is weakened by the majority’s reading of the text is correct. Congress passed the Privacy Protection Act in response to Zurcher v. Stanford Daily, 206 wherein the Supreme Court articulated an expansive view of the power of the

203. See id. at 121 (questions submitted by Senator Mathias).
205. See supra note 79 for the relevant provisions of S. 115, proposed by Senator Charles Mathias, Jr.
government under the Fourth Amendment. Because of Zurcher, Congress wanted to restrict the ability of criminal investigators to utilize a search warrant under a particular set of circumstances. The dissent's interpretation of the text inserts a pre-search check on the judgment of investigators, rather than relying on post-search lawsuits, and is thus a more effective method of protecting innocent parties engaged in First Amendment activities.

B. The Tenth Amendment and the Clear Statement Rule: Why the Majority is Right

The majority opinion in Citicasters is based on the premise that the absence of procedural provisions in the Privacy Protection Act was intentional. In addition to looking at the language of the Act, the majority noted that the procedural guidelines promulgated by the Department of Justice, as required by Subchapter II of the Act, which supplement but do not supplant the Act, explicitly place the decision that an exception to the Act exists in the Department of Justice, and do not require any statements in the warrant affidavit. Further, the majority found that Congress structured the Act so that concern over being sued would force law enforcement officers to comply with the substantive elements of the Act, and that Congress thus did not need to impose "elaborate procedural requirements." Finally, the majority opined that Congress was consciously avoiding interfering with state law enforcement procedures, choosing only to provide the substance of the law. The majority examined the text of the statute as a whole and the Attorney General's Guidelines promulgated under the Act to support its conclusion. In addition to the issues cited by the majority, the similar construction of the Omnibus Crime Control and Safe Streets Act of 1968 bolsters the majority's conclusion that state law enforcement procedure before state magistrates was intentionally omitted from the Act. Ultimately, it is the majority's passing

210. Citicasters, 89 F.3d at 1355.
211. See id. at 1355 n.6.
mention of federalism that provides the strongest argument supporting its conclusion.

1. "Silence" as Intentional Congressional Restraint

Unlike the dissent, which found that the absence of procedural directives in the Act compelled an examination of the legislative history for Congress' intended meaning, the majority found meaning in Congress' silence.213 Absent a specific provision that law enforcement officers must articulate the reason for seeking a warrant rather than using a subpoena when seeking evidence from non-suspects who are involved in First Amendment activities, the majority was disinclined to infer that such a provision was intended.214 Further, the majority found that details regarding warrant procedure were addressed in another part of the Act, and inferred that Congress had included all the details of procedure that were considered necessary.215

213. See Citicasters, 89 F.3d at 1354-55. Rather than focusing on the traditional canon of construction that silence is presumed to be intentional, the majority cited Supreme Court precedent for its pronouncement that if the statute is clear, the courts must follow the clear mandate of Congress. See id. The majority argued that the silence has clear meaning since the search warrant process was modified in other parts of the Act. See id. at 1355 n.6. See supra Part III.C.1 for a discussion of the majority opinion in Citicasters. For examples of traditional interpretation of silence in a statute, see Albernaz v. United States, 450 U.S. 333, 341-42 (1981) (rejecting petitioners' characterization of silence as an "ambiguity" and asserting that "if anything is to be assumed from the congressional silence on this point, it is that Congress was aware ... [of a rule of construction] and legislated with it in mind"); Scattered Corp. v. Chicago Stock Exchange, Inc., 98 F.3d 1004, 1006 (7th Cir. 1996) (stating that "legislative silence counts for nothing," and while ambiguous clauses in statutes can be cleared up by looking to the legislative history, unless there is a technical error in the statute, silence is presumed to be intentional); and In re Pelkowski, 990 F.2d 737, 741 (3d Cir. 1993) ("Pelkowski seeks to find a statutory ambiguity from the statute's silence. We see no reason to create an ambiguity. If Congress had intended that section ... not [to] apply ... we assume that it would have so stated.").

For a further discussion of interpreting statutory silence, see Laurence H. Tribe, Judicial Interpretation of Statutes: Three Axioms, 11 Harv. J.L. & Pub. Pol'y 51 (1988). Professor Tribe argues that when interpreting statutes, the search "must be not for a subjective, unenacted intent but for an objective, enacted meaning of a legal text." Id. But see Rotenberg, supra note 177, at 386, for a discussion of the variety of meanings that congressional silence can import. "Actual silence ... can mean at one extreme that during the legislative process no one thought of the issue and thus no one spoke of it or at the other extreme that Congress so obviously included the issue in the law that no comment was called for." Id.

214. See Citicasters, 89 F.3d at 1354.

215. See id. at 1355 n.6; see also 42 U.S.C. § 2000aa(b)(4)(B), (c) (1994 & Supp. II 1996). In § 2000aa(a)(c), if law enforcement officers are seeking a warrant pursuant to the exception outlined in § 2000aa(b)(4)(B), the person possessing the materials sought can submit an affidavit arguing that the materials sought should not be subject to seizure.
However, the majority did not merely rest on the traditional statutory canon to conclude that congressional silence was intentional. The majority found evidence that Congress intended to refrain from specifying that the law enforcement officer must state the exception under which a warrant was being sought, and that therefore, the only probable cause ruling needed from the magistrate was that the materials sought would be found on the premises to be searched.

The following subsections provide evidence found in the legislative history and circumstances surrounding the enactment of the Privacy Protection Act, which support the majority’s construction of the statute.

2. The Attorney General’s Guidelines

Judge Magill, writing for the majority in *Citicasters*, noted that the federal regulatory guidelines, entitled “Guidelines on Methods of Obtaining Materials Held by Third Parties,” promulgated pursuant to the Privacy Protection Act, prescribe federal agent procedures when seeking documentary evidence from any type of non-suspect in a criminal investigation.216 Under those guidelines, federal agents must comply with the Act, and the Department compels the law enforcement agent to justify the requirement for a search warrant inside the agency.217 In fact, the Guidelines clearly imple-

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217. See *Citicasters*, 89 F.3d at 1355 n.6. In addition, in early testimony before the Senate Subcommittee on the Constitution, Philip Heymann, Deputy Assistant Attorney General in the Department of Justice, indicated that he was at that time leaning toward having Federal agents make probable cause determinations as to whether a search warrant was appropriate under the Act because of their expertise. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 42-43, 59. A year later, in testifying before the Senate Judiciary Committee, he indicated that a magistrate should make such a ruling. See Senate Judiciary Comm. Hearings, supra note 74, at 43; see also 126 CONG. REC. 26,563 (1980) (comments of Senator Kastenmeier). In discussing final revisions made to the Privacy Protection bill, Senator Kastenmeier stated the following:

[T]he Attorney General ... desired more flexibility in developing procedures for searches of other third parties ... The essential difference between [this bill] and the original reported version is that it makes the decision to apply for a warrant for a third party search an administrative matter to be handled solely within the Department of Justice, acting pursuant to statutory guide-
ment the procedural safeguards within the Justice Department.\textsuperscript{218} Once internal approval is obtained, then the agent may apply for a warrant.\textsuperscript{219} With this internal procedural safeguard at the federal level, there is arguably no need for an additional layer of justification in the application for a warrant. The Department of Justice's articulation of the internal procedures needed to comply with the Act can be interpreted to support the majority's inference that the Act did not require a magistrate to have a role in determining whether the law enforcement officer reasonably believed an exception to the Act had been met.\textsuperscript{220}

3. The Role of the Department of Justice in Passing the Privacy Protection Act

While the majority opinion did not examine the legislative history of the Privacy Protection Act, the history does add further support to the majority's conclusion. Given that the language of the statute was actually drafted by officials in the Department of Justice,\textsuperscript{221} those drafters may have fully intended to leave procedural requirements out. First, they may have felt that at the federal level, the expertise existed inside the Justice Department to make the decisions as to whether an exception had been met.\textsuperscript{222} In addition, the principal drafter, Philip Heymann, Assistant Attorney General of the Department of Justice, testified at a Senate Judiciary Committee hearing that the Justice Department was generally "concerned

\textit{Id.}

\textsuperscript{218} See 28 C.F.R. \S\S 59.1-6. See \textit{supra} note 97-101 and accompanying text for a description of the provisions of the Guidelines.

\textsuperscript{219} See 28 C.F.R. \S 59.4.

\textsuperscript{220} On the other hand, the structure of the Guidelines also supports the dissent's view. If the Guidelines, with their emphasis on internal articulation of the exceptions to the Act, are more liberal than the provisions of the Act, it helps explain why the Justice Department argued so strenuously for a narrow, "press-only" bill. Under this line of thinking, the Justice Department, as principal author of the bill that eventually passed, fought a broad bill applicable to all third parties searched because it wanted to be free to adopt less restrictive procedures for non-press third party searches prescribed in the Guidelines. It would help explain the Department's insistence on the press-only bill if it would gain greater independence through procedures developed by its own guidelines.


\textsuperscript{222} See \textit{supra} note 217.
about the problems of federalism." However, by limiting the application to the press and grounding the bill on the Commerce Clause, "there is no reason to worry or be ashamed of the fact that our bill would reach State officials" by imposing procedures on state and local law enforcement agencies. Given that he did express concerns about federalism, the language he drafted should have consciously articulated all procedures to be imposed on states, such as the requirement for a subpoena-first preference. Any procedures left out, arguably, were left out intentionally.

Other speakers at the same Judiciary Committee hearing spoke about the many different sets of criminal procedure laws around the country. They were concerned about the ability of the federal government to accommodate the differing ways of issuing subpoenas and search warrants in the provisions of any bill passed. Viewing the statute with this in mind, the Act may have been structured to sidestep conflicts with existing criminal procedure laws. To effect this goal, the absence of procedural language may have been intentional.

Thus, the majority could have bolstered its argument with the fact that the legislation was drafted by law enforcement officers seeking to maintain as much control as possible for law enforcement agents while still enhancing protection of non-suspects with criminal evidence. Under the majority's construction of the statute, the control is maintained in the face of a strong presumption in favor of a subpoena by allowing the law enforcement officer to make a determination that an exception to the presumption of a subpoena allows the use of a search warrant. While this construction of the statute creates a very weak method for curbing law enforcement powers, relying primarily on self-enforcement, the majority noted that "it is not for the federal courts to redraft legislation merely because we would have selected different [enforcement] procedures."

223. 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 333-34 (statement of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice).
225. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 413-14 (comments of Richard N. Gottfried, Assemblyman, New York State Assembly Chair of Codes Committee).
226. See id.
228. Citicasters v. McCaskill, 89 F.3d 1350, 1355 (8th Cir. 1996). However, to
4. Title III Omnibus Crime Control and Safe Streets Act

A comparison of the Privacy Protection Act with the Omnibus Crime Control and Safe Streets Act of 1968\textsuperscript{229} ("Title III") provides further support for the majority's construction of the Privacy Protection Act. Title III was often cited in congressional hearings both as a model for the design of the Privacy Protection Act and as the only other example of congressional action to regulate state and local police activity on Fourth Amendment issues.\textsuperscript{230} Title III is intended to prohibit unconsented wiretapping of private parties and regulate and limit the use of wiretapping by law enforcement officers.\textsuperscript{231} As with the Privacy Protection Act, Congress found the authority to regulate state and local law enforcement procedure through the use of the Commerce Clause.\textsuperscript{232} In Title III, Congress requires that federal, state, and local law enforcement officers desiring to wiretap apply for an order from a federal or state judge.\textsuperscript{233}


\textsuperscript{230} For example, acting as advocates for passing a privacy protection bill in hearings before the 1979 House Subcommittee on the Courts, Civil Liberties, and the Administration of Justice, the American Civil Liberties Union concluded that Congress had the right to regulate state and local police procedures, and had done so in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See 1979 House Subcomm. on the Courts Hearing, supra note 68, at 49 (statement of John H.F. Shattuck, Washington Director, American Civil Liberties Union).

\textsuperscript{231} See 18 U.S.C. § 2510.

\textsuperscript{232} See id. The purpose of the Act is described as follows: (b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

\textsuperscript{233} See id. § 2518.
The judge must make a finding of probable cause to believe that: the individual is involved in a crime for which a wiretap is allowed, relevant information will be obtained from the wiretap, normal procedures have been exhausted, and the location to be tapped is used by the suspect.\footnote{234}

The purpose of the Privacy Protection Act echoes that of Title III in some respects. Specifically, both are designed to limit invasive procedures by law enforcement officers and enumerate exceptions under which such officers may seek to use the invasive procedures.\footnote{235} Reflecting this, the two acts have a similar structure. While they differ substantively,\footnote{236} because Title III was cited as a model for the Privacy Protection Act, the procedural differences between the two acts are instructive. Most significantly, the Privacy Protection Act does not contain Title III's specific procedural section with language stating that judges must find, for example, "probable cause for a belief that an individual is committing ... a particular offense enumerated [in another section of the Act]" before a search warrant can be issued.\footnote{237} While Title III describes

\footnote{234} See id. §§ 2511, 2516, 2518. The statute requires that law enforcement agents desiring to wiretap get authorization from an Attorney General or Assistant Attorney General at the federal level to apply to a judge for an authorizing order. See id. § 2516(1). An officer must request that the "principal prosecuting attorney" at the state or local level apply to a state court judge for an authorizing order. Id. § 2516(2). A section of the Act is devoted to a "[p]rocedure for interception of wire or oral communications." It specifies in detail the application requirements for an authorizing order, and specifies also the specific findings the judge must make. See id. § 2518(3).

\footnote{235} In the Privacy Protection Act, the conditions which permit an exception to the subpoena first rule are as follows: if the person possessing the evidentiary material is a criminal suspect in the matter, if seizing the materials will prevent serious harm to others, if there is reason to believe the materials will be destroyed, or if all other remedies have been exhausted. See 42 U.S.C. § 2000aa(a)-(b) (1994 & Supp. II 1996). In Title III, the conditions which permit an exception to the prohibition against wiretaps are the following: if the person is involved in a crime for which wiretaps are allowed (listed in the Act), if relevant information will be obtained from the wiretap, if normal procedures have been exhausted, and if the location to be tapped is used by the suspect. See 18 U.S.C. § 2518(3).

Wiretapping is an extremely invasive procedure, more invasive and continual than a one-time search. Stricter procedures are appropriate. See Garcia, supra note 229, at 301.

\footnote{236} The Privacy Protection Act seeks to limit the use of a search warrant in favor of a subpoena. Title III seeks to limit the use of an even more invasive evidence-gathering technique, the wiretap, and requires a search warrant in order to procure permission for its use.

\footnote{237} 18 U.S.C. § 2518(3)(a). In addition, the Privacy Protection Act does not contain Title III's exclusionary rule. Thus, under the Privacy Protection Act, even material gathered through the use of a warrant obtained in violation of the Act will not be excluded for use in a trial. However, under the Privacy Protection Act, the material has been collected from non-suspects. Compare 42 U.S.C. § 2000aa-6(e), with 18 U.S.C.
the findings the judge must make, the Privacy Protection Act does not.238 In fact, the only mention of judicial officers in the Privacy Protection Act is its explicit provision of immunity for them.239 Finally, the Privacy Protection Act provides a complete good faith defense when government officers are sued personally, if an officer “had a reasonable good faith belief in the lawfulness of his conduct.”240 Title III’s good faith defense provisions, by contrast, come into play when the person sued can prove a “good faith reliance on a court order.”241 Contrasting these provisions, since the Privacy Protection Act’s good faith defense is based solely on an officer’s good faith reliance on his own beliefs, it would follow that the Act presumes that the decision to seek a warrant under one of the Act’s exceptions is based solely on the judgment of a law enforcement officer.

The conspicuous modelling of the Privacy Protection Act on Title III and the absence of the articulated probable cause determination by the judiciary regarding the applicability of an exception, as well as the differing good faith defense provisions, provide evidence that the omission of the judicial role in the Privacy Protection Act was intentional and not an oversight. This provides further support for the majority’s position in Citicasters.

5. Tenth Amendment Concerns of the Majority

a. Legislative history and the Tenth Amendment

The majority in Citicasters argued that procedural issues were omitted intentionally in the Privacy Protection Act to avoid excessive imposition on state law enforcement procedures.242 The legislative history offers support for the majority’s conclusion regarding procedural issues. For example, the Senate Report reveals that some senators had “serious constitutional and policy questions about congressional authority to impose law enforcement proce-

§ 2515. Both acts provide a civil cause of action with similar damage provisions; however, the Privacy Protection Act specifically authorizes suit against the Federal government and other governmental entities, whereas Title III authorizes suits against “any person,” but does not provide blanket authorization to sue the Federal or state governments. Compare 42 U.S.C. § 2000aa-6(a), with 18 U.S.C. § 2520.


239. See 42 U.S.C. § 2000aa-6(c). Presumably, however, common law judicial immunity would be available to judges or magistrates under Title III.


242. See Citicasters v. McCaskill, 89 F.3d 1350, 1355 n.6 (8th Cir. 1996).
dures on the states." ^243 At the first hearing on legislation proposed in response to *Zurcher*, speakers expressed concern over a statute that would intrude into areas of traditional state control. ^244

Many of the bills proposed in response to *Zurcher* based congressional authority on the Fifth Section of the Fourteenth Amendment under the theory that the Fifth Section explicitly gave Congress the power to regulate states in the name of protection of constitutional rights. ^245 Nevertheless, Philip Heymann, speaking for the committee that drafted the Act, was extremely reluctant to use the Fifth Section of the Fourteenth Amendment as the basis of congressional authority. ^246 In *Zurcher*, the Supreme Court had ex-

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243. S. REP. NO. 96-874, at 18 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3964-65. In addition, such concerns were expressed by numerous witnesses in early hearings. See, e.g., 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 61 (testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice); id. at 121-24 (testimony of John H. Shattuck, Director, American Civil Liberties Union); id. at 325 (testimony of James B. Zagel, Executive Director, Illinois Law Enforcement Commission); id. at 375 (testimony of William Cohen, Professor, Stanford University Law School).

Concerns about congressional authority to impose law enforcement procedures on the states were also expressed by some Congressman who proposed bills applying to federal law enforcement officers only. See, e.g., H.R. 1373, H.R. 1305, and H.R. 322, 96th Cong. (1979).

244. For example, in Philip Heymann's first testimony on June 22, 1978, before the Senate Subcommittee on the Constitution, he stated the following:

National legislation may be a subject of slightly more concern in this particular case because law enforcement procedure is an area where Congress has gone out of its way to leave the States considerable freedom after they satisfy their constitutional obligations. There is an exception to Congress' restraint in this area: the wiretap statute is a Federal law regulating the States. But it is the only exception. Law enforcement is near the heart of State powers.

1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 44 (testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice).

245. For examples of bills using the First and Fifth sections of the Fourteenth Amendment to justify congressional involvement in such traditionally locally controlled operations, see S. 1364, 95th Cong. (1978), reprinted in 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 4; S. 115 and S. 1816 96th Cong. (1980), reprinted in Senate Judiciary Comm. Hearings, supra note 74, at 11, 27.

The Fifth Section of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. This section is the enforcement clause for the First Section of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See supra note 83 and accompanying text for a discussion of the Fourteenth Amendment debate during the legislative hearings for the Privacy Protection Act.

246. See 1978 Senate Subcomm. on the Constitution Hearings, supra note 66, at 44 (testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Depart-
pressly ruled that the search undertaken by the Palo Alto police did not violate First or Fourth Amendment rights. Therefore, some argued that Congress could not legitimately pass an act protecting rights that the Court had expressly stated did not exist.\textsuperscript{247} As a result, the legislation that passed was instead tied to the Commerce Clause and limited to persons engaged in First Amendment activities, on the theory that persons with an intent to disseminate materials would engage in interstate commerce.\textsuperscript{248} Because congressional authority to pass the Act was finally based on the Commerce Clause, it is possible that Congress did not insert detailed procedural provisions for fear that they would exceed the authority the Commerce Clause provided.\textsuperscript{249}

\begin{itemize}
\item \textsuperscript{247} A countervailing viewpoint was expressed by John H.F. Shattuck, Washington Director, American Civil Liberties Union at the Senate Subcommittee on the Constitution Hearings. He argued that in \textit{Katzenbach v. Morgan}, 384 U.S. 641, 650 (1966), the Court ruled that the Fifth Section of the Fourteenth Amendment gave Congress the same powers as the Necessary and Proper Clause of Article I, Section 8, Clause 18. See \textit{1978 Senate Subcomm. on the Constitution Hearings}, supra note 66, at 111 (testimony of John H.F. Shattuck). In \textit{Katzenbach}, he argued, the Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965 as a valid exercise of congressional power under the Fifth Section of the Fourteenth Amendment. Shattuck argued that the Privacy Protection Act is also a valid exercise of congressional power under that amendment, protecting First and Fourth Amendment rights. He stated that "the States are nowhere in the Constitution given explicit authorization to regulate police practices," and that "police procedures have been uniformly regulated on a national basis by Congress." \textit{Id.} at 111-12. Therefore, he swept aside Tenth Amendment concerns. But see supra note 83 for the Justice Department's argument that this would be too broad a reading of congressional power under Section 5 of the Fourteenth Amendment, and for a citation to a recent Supreme Court decision supporting the Justice Department's argument.

\item \textsuperscript{248} See \textit{1978 Senate Subcomm. on the Constitution Hearings}, supra note 66, at 333-34; see also supra note 83.

\item \textsuperscript{249} At the time of consideration of the Privacy Protection Act, the Supreme Court had recently examined the limitations of congressional power over traditional state functions through the use of the Commerce Clause in \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976). In that opinion, the Court ruled that Congress could not intrude into traditional state functions, left to states by the Tenth Amendment, in the name of the regulation of commerce. While \textit{National League} has since been overruled by \textit{Garcia v. San Antonio Metropolitan Transit Authority}, 469 U.S. 528 (1985), from 1978 to 1980, when the Privacy Protection Act provisions were being debated, Congress was aware of judicially imposed limits on the Commerce Clause, based on the powers reserved to the states in the Tenth Amendment.

In the opinion of a representative from the American Civil Liberties Union, Congress was authorized to impose minimum standards that could be related to the Commerce Clause on the states, but should not impose "elaborate procedures" on a state court system. See \textit{1979 House Subcomm. on the Courts Hearing}, supra note 68, at 58 (testimony of John H.F. Shattuck, Washington Director, American Civil Liberties
Speakers at congressional hearings also questioned the practicability of imposing specific procedures at the state and local levels. Many states, like Missouri in *Citisters*, did not have subpoena procedures available to law enforcement officers in the investigative stage of a criminal proceeding. If Congress did have the power to enact a law that specified procedures for the procurement of a search warrant at the state and local level, some states would be forced to adopt new procedures to effectuate the law.

Thus, Congress had a substantive goal with potential procedural problems. To address this problem, the Act created a one year grace period before provisions that affected a state took effect. Congress intended to give the states the ability to adapt their own procedures to the requirements of the law.

b. Analysis of the Privacy Protection Act under the Commerce Clause

The majority in *Citisters* remarked on "the proper restraints
of federalism."255 Recent decisions of the Supreme Court have re­examined the issue of federalism, particularly in terms of the limita­tions the Tenth Amendment places on Congress’ ability to regulate areas of traditional state control through the Commerce Clause.256

While Congress assumed it had the power to pass the Privacy Protection Act under the Commerce Clause at the time of its pas­sage, the Privacy Protection Act is also, arguably, within the more restrictive current parameters of the Commerce Clause. It specifically protects persons who intend to communicate their ideas to the public, whereby such communications enter the stream of commerce.257 In United States v. Lopez,258 the Supreme Court defined three permissible categories of activities which Congress could reg­ulate or protect under its Commerce Clause power: (1) use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) activities having a “substantial relation” to interstate commerce.259 The Privacy Protection Act fits most comfortably into the second category, by protecting persons or things involved in interstate commerce through the use of its prescribed procedures.260 In addition, the press and

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255. Citicasters v. McCaskill, 89 F.3d 1350, 1355 n.6 (8th Cir. 1996).
256. These decisions came after Garcia v. San Antonio Metropolitan Transit Au­thority, 469 U.S. 528 (1985). See New York v. United States, 505 U.S. 144 (1992) (hol­ding that Congress may not compel the states to enact and enforce a federal regulatory program); United States v. Lopez, 514 U.S. 549 (1995) (holding that a federal law making illegal the possession of guns near schools was outside the scope of the Commerce Clause—and impliedly violated the Tenth Amendment by intruding on powers reserved for the states); United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (hol­ding that states, conversely, may not impose term limits for members of Congress—that is not a power reserved to the states by the Tenth Amendment); Printz v. United States, 117 S. Ct. 2365 (1997) (holding that a federal law requiring that mandatory background checks on applicants for firearms be undertaken by state or local law enforcement officers is unconstitutional under the Tenth Amendment because it requires state officers to “administer or enforce a federal regulatory program”). These decisions indicate that the Supreme Court is taking more seriously the requirement that laws have a substan­tial economic affect on interstate commerce, Lopez, 514 U.S. at 559, and protecting powers reserved to the states by the Tenth Amendment. See supra note 249 for a discussion of Garcia and prior holdings.
259. Id. at 558-59.
260. See 42 U.S.C. § 2000aa(a)-(b). Courts have recently upheld the constitu­tionality of a federal carjacking statute, 18 U.S.C. § 2119 (1994 & Supp. II 1996), under the Commerce Clause with similar reasoning, i.e., that the statute protects the travel of interstate travellers or regulates an item in interstate commerce. See United States v. Bishop, 66 F.3d 569, 588-90 (3d Cir. 1995); United States v. Robinson, 62 F.3d 234, 236-37 (8th Cir. 1995); United States v. Carolina, 61 F.3d 917 (10th Cir. 1995). Other courts
other modes of communication appear to be instrumentalities of commerce, which Congress may also protect.

Alternatively, the Act fits into the third category defined by the Supreme Court, which allows Congress to regulate activities having a "substantial relationship" to interstate commerce. The Privacy Protection Act regulates criminal law enforcement procedures that substantially affect the operation of press activities; by using search warrants when seeking documentary evidence, law enforcement officers disrupt the efficient workings of the press.\footnote{See \textit{42 U.S.C. § 2000aa}.} However, defining the Act's relationship to the Commerce Clause in this way, underscores that Congress is directly regulating the actions of state and local law enforcement agencies as both a means and an end, and implicates problems for the statute's constitutionality under the Tenth Amendment.

c. \textit{The Privacy Protection Act under current Tenth Amendment analysis}

The Privacy Protection Act may be unconstitutional even as interpreted by the majority in \textit{Citicasters}. The Supreme Court is increasingly protective of the right of states to control their core functions, and law enforcement is at the heart of such core functions.\footnote{See \textit{Lopez}, 514 U.S. at 564 (stating that criminal law enforcement is an area "where States historically have been sovereign"); \textit{see also} Julian Epstein, \textit{Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases}, 34 \textit{Harv. J. on Legis.} 525, 525-26 (1997); Chris Marks, U.S. Term Limits, Inc. \textit{v. Thornton} and \textit{United States v. Lopez: The Supreme Court Resuscitates the Tenth Amendment}, 68 \textit{U. Col. L. Rev.} 541, 569 (1997) (noting that the recent Supreme Court decisions are "a wakeup call for Congress to take a long, hard look before it starts to regulate" (quoting Carter G. Phillips \& Joseph Calve, \textit{What Does Lopez Mean?}, \textit{Conn. L. Trib.}, Aug. 14, 1995, at 14)).} Most recently, in \textit{Printz v. United...
States,264 the Court struck down as unconstitutional a provision of the Brady Act which required local law enforcement officers to perform a background check on prospective purchasers of guns.265 The Court held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."266

Arguably, the Privacy Protection Act does not compel states to enact or enforce a federal regulatory program, nor does it compel state agents (law enforcement officers) to enforce a regulatory program. Instead, the Privacy Protection Act compels state agents to substitute certain procedures, because procedures which they might otherwise use, while constitutional, inhibit the effective operation of the press, which is involved in interstate commerce.267 In Printz, the Brady Act impermissibly compelled state agents to perform a new duty, not to substitute an existing duty, in order to achieve the goal of enforcing the federal handgun control law.268

On the other hand, the Act does impose a new duty, which is the duty to avoid the use of search warrants when seeking information from persons involved in First Amendment activities. Before the enactment of the Privacy Protection Act, law enforcement officers were not asked to differentiate among third party non-suspects. Their duty was to focus solely on the search for evidence.

In addition, the Privacy Protection Act regulates police procedures as the means by which the goal of protecting the press is achieved. While it does not appear to fall neatly within the forbidden categories of enlisting states to effectuate federal "programs," arguably, Congress' goal in passing the Act—giving greater protection to the press—is a federal program. Further, its direct control of the behavior of state officers may be equally offensive to the principles of the Tenth Amendment,269 especially since state law permits, and the First and Fourth Amendments do not restrict, their

265. See id. at 2384.
266. Id.
268. See Printz, 117 S. Ct. at 2368-69.
269. See Condon v. Reno, 972 F. Supp. 977, 984-85 (D.S.C. 1997) (finding that the Driver's Privacy Protection Act, which was based on the Commerce Clause and restricted the information which could be released from state motor vehicle records, was unconstitutional in light of Printz, because it regulated the conduct of state motor vehicle department employees).
If the Privacy Protection Act were to require that an assertion of the grounds for an exception to the Act be stated by the law enforcement officer applying for a warrant, as argued by the dissent in Citicasters, it would only impose more suspect directives on state agent behavior.

Courts, which strive to avoid finding that statutes are unconstitutional, must interpret enacted legislation in a way that will minimize Tenth Amendment implications. Thus, in light of heightened Tenth Amendment concerns, the Privacy Protection Act must be interpreted as the majority did in Citicasters.

d. The role of the clear statement rule for courts

The Privacy Protection Act does not explicitly require law enforcement officers to state their reasons for seeking a warrant to the issuing magistrate, and prudent statutory interpretation, in light of recent cases like New York v. United States and Printz v. United States indicates that law enforcement officers have no such obligation. Unless Congress makes a clear statement of its intent to interfere with an aspect of state-controlled law enforcement procedures, courts should not assume such an intent was present. While merely an interpretive tool, and perhaps not fairly imposed post hoc, a "clear statement" rule provides the court with a guideline for interpreting laws which pose potential Tenth Amendment problems. A strong "clear statement" rule was articulated in Greg-

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270. See Printz, 117 S. Ct. at 2383 (noting that when the object of a law is to "direct the functioning of the state executive," it offends the principles of separate sovereignty).


274. For example, in the area of the federal government impinging on a state's Eleventh Amendment sovereign immunity, see the following cases: Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (stating that Congress may not invalidate states' sovereign immunity unless it has "unequivocally expressee[d]" its intent to do so (quoting Green v. Nansour, 474 U.S. 64, 68 (1985)); Will v. Michigan Department of State Police, 491 U.S. 58, 65 (1989) (finding that a clear statement is required to compel states to entertain damages suits against themselves in state courts); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985) (holding that the intent to abrogate state sovereign immunity must be expressed in "unmistakable language"). See also Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (noting that there is a "longstanding rule" that the Court "will not infer pre-emption of the States' historical police powers absent a clear statement of intent by Congress").
ory v. Ashcroft,275 where the Court held that in order to enforce Commerce Clause-based statutes regulating the states, it would expect to be “absolutely certain” that Congress explicitly contemplated and decided to impose a federal provision over a fundamentally state function.276 Congress should clearly state into which areas of traditional state control it plans to intrude.277

It is Congress, and not the courts, which decides to intrude into areas of traditional state control. Since Congress did not clearly state its intent to regulate law enforcement procedures by way of requiring law enforcement officers to articulate to a magistrate the reason for seeking to use the warrant exception to the Privacy Protection Act, courts should refrain from imposing such regulations.

CONCLUSION

Congress passed the Privacy Protection Act to protect the First Amendment rights of the press by limiting the ability of police to use the invasive tool of search warrants on press premises. The Act is silent on the issue of whether a law enforcement officer must state in his affidavit for a search warrant under which exception provided by the Privacy Protection Act a warrant, instead of a sub-

275. 501 U.S. 452 (1991). In Gregory, the Court held that a state did not have to comply with the Age Discrimination in Employment Act (“ADEA”) and modify its mandatory retirement provisions applying to state judges. See id. at 473. The ADEA bars employers, including state governments, from adopting mandatory retirement policies, but it exempts state government “appointee[s] on the policymaking level.” Id. at 465. The Court stated that unless Congress clearly stated that it intended to displace state government retirement policies, such fundamental state sovereign decisions would be left alone by the Court. See id. at 467.

276. See id. at 464. William N. Eskridge, Jr. and Philip P. Frickey, in their foreword to The Supreme Court, 1993 Term in the Harvard Law Review note, “[t]he decision in Gregory was the Court’s signal to Congress that the Tenth Amendment has bite again . . . at least where Congress regulates the states as states.” William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 82 (1994); see also Note, Clear Statement Rules, Federalism, and Congressional Regulation of States, 107 HARV. L. REV. 1959, 1972 (1994).

277. See United States v. Bass, 404 U.S. 336, 349 (1971) (holding that defendants could not be convicted under federal statute without proof that the gun possessed was “in or affecting interstate commerce”). In Bass the Court stated the following: [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 345.
poena, is being sought. There is no conclusive evidence either that Congress intentionally omitted procedural language, or that it assumed this procedure would be used to comply with the Act.

It is the job of the courts to interpret laws and to protect Constitutional rights. The Privacy Protection Act has multiple links to the Constitution. Congress used the Commerce Clause for authority to pass the Act, and it was attempting to protect First Amendment rights and add protection not provided under the Fourth Amendment. The Act also implicates the Tenth Amendment, which protects the states’ rights to govern fundamental functions that protect the health, safety, and welfare of its residents. In such a case, courts must closely adhere to the intent of Congress as expressed in the language of the Act, but they must interpret legislation in a way that closely guards the rights afforded citizens and states by the Constitution.

If a reviewing court decides that Congress intended to require law enforcement officers to articulate to a magistrate the reasons they think an exception to the Act has been met, the decision will result in the imposition of duties on both state and local law enforcement officers and magistrates. Such a decision would implicate Tenth Amendment rights. Given that recent Supreme Court decisions reflect an increasing scrutiny of federal legislation that imposes duties on state agencies, the constitutionality of the Privacy Protection Act even without the contested procedure is suspect. A court should not infer that additional procedures were intended.

Thus, judicial conclusions regarding congressional intent to regulate state and local police procedures, protected generally by the Tenth Amendment, should be based on explicit language. Courts should apply a "clear statement" rule when analyzing statutes that intrude into areas of traditional state control.

Congress has not made a clear statement of its intent to require judges or magistrates to rule on stated exceptions to the Privacy Protection Act, and therefore such a procedure should not be required by courts. While this interpretation may mean that the Act fails to achieve Congress’ purpose in passing the statute, it is Congress, and not the courts, that must attempt to rectify the problem.

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