namese Communists sought to unite most elements in their country against foreign aggression the Cambodian Communists were fighting a fratricidal civil war, first against Sihanouk (who then allied with them after his overthrow by right-wingers) and later against his U.S.-backed successor Lon Nol. This particularly bitter experience of civil war made the Khmer Rouge more ruthless toward their own people than the Vietnamese were.

Nonetheless, Vietnam's invasion is a full-scale military intervention like that of the United States in South Vietnam and more bloody than the Soviet Union's invasion of Czechoslovakia. The Rumanian leaders are quite right to object that "no reasons and arguments whatsoever can justify intervention and interference in the affairs of another state." It is the rankest hypocrisy for a country like America with its recent record in Indochina to denounce Vietnam's attack. Moreover, the U.S. response shows that America is in danger of moving into an alliance with China. There is a grave danger that American officials, by calling this conflict a "proxy war" (Brzezinski) "encouraged by the Soviet Union" (Kissinger), will make the stakes in Indochina once again global and stimulate the direct participation of the great powers. While Vietnam certainly has no business in Cambodia, America, with its recent record in Southeast Asia so bloody, should keep its hands off and its mouth shut. ❑

The approved Nixon version

Safirized history

WHILE THE VIETNAMESE AND THE Cambodians have been fighting out the last days of the Third Indochina War, William Safire, columnist for the *New York Times*, has been rewriting the history of the Second. On January 11, in a column entitled "Now We Know," Safire breathlessly reveals that, contrary to leftist propaganda and popular belief, the United States did not invade Cambodia in 1970.

Safire owes this startling news to the "Black Paper" recently released by the Pol Pot regime. According to Safire, this document proves what "protesters and dissenters" tried to cover up in 1970: that Vietnamese Communists were using Cambodian territory "as a safe staging area for attacks into South Vietnam." And because the Vietnamese had entered Cambodia illegally, "Now we know we were right—in law, in morality, in military tactics—to attack the forces that had already invaded Cambodia."

Sound familiar? It should. Safire has rummaged in the files, dug out some of the old speeches that he used to write for Nixon and the boys, and dressed them up for readers of the *Times*. Of course, Safire is joshing us a bit when he exclaims, "now we know" that there were Vietnamese Communists in Cambodia in 1970. He didn't need Pol Pot to tell him: He knew it then, as did everyone else, including the "protesters and dissenters." The Vietnamese had long used Cambodian border areas as rear bases. Some of their supplies arrived from the north via routes through the northeastern provinces of Cambodia; others were delivered by sea to the port of Sihanoukville, where they were transshipped to the border area—according to some reports, in trucks owned by high officials of the Cambodian government. Sihanouk tacitly supported the Vietnamese in their struggle to kick the Americans out of their country; as Safire himself admits, quoting a Cambodian official, Sihanouk " 'wanted to be in solidarity with the Vietnamese.' " Calling the Vietnamese "invaders" does violence to the word. "Pushy guests" would be a better way to put it.

Of course Nixon did not, as Safire implies, invade Cambodia to rescue it from Vietnamese "invaders." To be blunt, Nixon didn't give a damn about Cambodia. Wanting to buy time for his "Vietnamization" program, Nixon hoped the invasion would eliminate the Communist bases and take pressure off South Vietnam. Opponents of the invasion—including the CIA, much of the State Department, the secretary of defense, and millions of people in the streets—warned that the invasion would drive the Vietnamese deeper into Cambodia, drag another country into the fighting, and prolong the agony of the war. Though Safire forgets to mention it, Nixon was wrong; the opponents were right. The result for the Cambodians was the bloody nightmare they are still living.

If that had been the extent of Safire's contribution to historical revisionism, it would have been enough. But it wasn't. Writing of the campaign of "secret bombing" that began in 1969, Safire reveals that "now we know that the bombs fell not on peaceful Cambodians, as our doves were insisting, but on a powerful Vietnamese fighting and logistical force. . . ." This is a startling claim; as far as we know, Safire is the first to make it. That's probably because it's not true.

Consider the facts: In the 14 months of the "secret bombing" campaign American B-52s flew 3695 raids and dropped 105,837 tons of bombs on Cambodia. The planes typically flew in formations of three, releasing 90 tons of bombs from a height of six miles. Below them they left a swath of destruction a mile and a half long and half a mile across. According to all reliable sources, many Cambodians were victims of these undiscriminating attacks. But Safire says that "the U.S. did not brutalize Cambodians with our bombing."

Thus is history Safirized. To be charitable, it may be that Safire has grown a little dizzy from having spent too much time with his nose in the dirty linen of Bert Lance and Billy Carter. But it seems more likely that he is still trying to make us forget that it was Safire's old boss who bears moral responsibility for the tragedy that befell Cambodia. ❑

FIRST AMENDMENT WATCH

NAT HENTOFF

Privacy for writers and doctors only?

A LONGTIME, AND INDEED honored, investigative reporter for television, Lee Hays, is writing a book about a Brooklyn family that allegedly has engaged in wholesale murder. For this book, Hays interviewed a man expected to be a prosecution witness at the trial of a member of that clan. When the defendant's attorney moved to obtain Hays's notes and tapes of the interview, in the hope that he could use them to impeach the credibility of the witness, Hays resisted on the ground that the New York state "shield law" protected journalists from having to turn over such material.

Ruling against him, New York State Supreme Court Justice Sybil Hart Kooper declared that whatever Lee Hays may have been in the past, he is not a journalist now. Since he is writing a book, he is an author, and there is no language in the shield law protecting authors. (Only "professional journalists" are covered, and that term is defined as "One who, for gain or livelihood, is engaged in gathering, preparing, or editing of news for a newspaper, magazine, news agency, press association, or wire service." Not a word about books.)

Justice Kooper might wisely have stopped at that point, indicating that she was bound by the language of the statute and that the legislators, should they so desire, might want to amend it to include those authors who did investigative reporting for their books. But the jurist went much further, insisting that there is a great divide between a journalist and an author of books. Gosh, she said, "if anyone who wrote anything could call himself or herself a journalist, the results would be ludicrous. Imagine, Betty Ford writes her autobiography. Is she a journalist? Julia Child pens a cookbook. Is she a journalist?"

But Lee Hays is writing neither an autobiography nor a cookbook. In researching the alleged murders, he is using the same techniques as a journalist would. The only difference is that his work will first appear bound between covers. In my own case, having never received a large enough advance for a book to let me do nothing else but write it, I work out magazine and newspaper assignments so that parts of a book first appear in periodical form. If I am unable, however, to sell two or three chapters beforehand, does the shield law leave off protecting me for those parts of the book?

I mention this vulnerability for "authors"—Sybil Hart Kooper is apparently the first judge in the country to rule on the matter—to indicate the multiple snares created by overly narrow restrictions in "protective" statutes. What about scholars and academic researchers, for another example of largely unprotected writers? A survey by the *Chronicle of Higher Education* (Dec. 4, 1978) discloses that in only a few cases have scholars been able to "win a clear-cut legal decision granting them the privilege of confidentiality." Most of the rest are, like Lee Hays, excluded from any shield laws protecting journalists. And in recent years, at least several dozen scholars and researchers have had their records and notes subpoenaed. This possibility is particularly threatening, as the *Chronicle* notes, "for social scientists, whose investigations into such matters as criminal justice, drug abuse, corruption in government, and corporate management often lead them into controversial and legally sensitive areas."

Since May 31, 1978, however, the government—federal, state, and local—has had a much more sweepingly effective means of obtaining notes and confidential sources than by subpoenaing them. On that date, in *Zurcher* v. *Stanford Daily*, the Supreme Court gave law enforcement officials the power to conduct surprise searches of the offices and homes of journalists, authors, scholars, academic researchers, and anyone else in this country. No subpoena is necessary—just a search warrant, which requires no notice.

All that's needed is for law enforcement officials to convince a magistrate they have probable cause to believe that evidence of a crime is on the premises to be searched. For the first time in the nation's history, this decision allows such searches even when the owner or occupant of the place to be searched is not himself suspected of any criminal involvement. Accordingly, the Fourth Amendment rights of "innocent third parties" were shredded by the Court [*INQUIRY*, Aug. 21, 1978].

Although the High Court said that search warrants would be issued carefully and narrowly, the fact—as any criminal lawyer or police reporter knows—is that the vast majority of magistrates are as likely to refuse a request for a warrant as they are to decline an appointment to a higher judicial post. And in any case, as attorney Nathan Lewin points out, "since the proceeding is entirely one-sided—the person whose house is to be searched obviously is not told in advance, so there is no chance to challenge the warrant application—no one usually questions the police's or prosecutor's conclusion that a search is needed."

ONE RESULT OF THE Zurcher decision has been a leveling of all groups that previously had, or thought they had, special privileges. Journalists cannot now use the First Amendment to bar the door to a surprise raid. Doctors and lawyers cannot use their professional relationships to prevent cops from swooping up papers concerning their patients and clients.

In the rush to get legislation to undo *Zurcher*, each group has tried to insure that it, at least, would be safeguarded henceforth. Journalists' associations, while saying that they preferred a law that would protect every "innocent third party" from surprise searches, made clear they would settle for a measure helping only themselves: a bill requiring any law enforcement agency that demanded material from newspapers or individual journalists to seek subpoenas, rather than mere search warrants. (A subpoena requires a hearing, which rules out a surprise raid.) The Authors' League of Amer-

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ica, meanwhile, lobbied the House and Senate, urging that any legislation also protect writers and publishers of books. If confidential materials could be turned up in newspaper raids, so too could they be found when police rummaged through an author's study or a publisher's office.

Not to be left out, the American Psychiatric Association insisted that its members also be immune from surprise searches. Testifying before the Senate Judiciary subcommittee on the Constitution, Dr. Jerome Beigler, chairman of the APA's committee on confidentiality, reminded the legislators of "the infamous Ellsberg case. The office of his psychiatrist, Dr. Fielding, was burglarized and records stolen at the direction of high officeholders, who . . . believed they were good men with honorable intentions. A warrant now permissible [under *Zurcher*] would have made such invasion lawful."

Most judges are as likely to deny a request for a warrant as they are to decline an appointment to a higher judicial office.

There were no lobbyists for the relatively unaffiliated, those "countless law abiding citizens" referred to in Justice Stevens's dissent in *Zurcher*: "merchants, customers, bystanders [who] may have documents in their possession that relate to an ongoing criminal investigation." And who may very well not know that those documents are at all connected with a criminal matter. "The consequences of subjecting this large category of persons to unannounced police searches," said Stevens, "are extremely serious." Among other perils to the innocent third party, "the search for the documents described in a warrant may involve the inspection of [additional] files containing other private matter." After all, to get to what they want, the cops have to go through a lot of other things; and they like to browse as well as you do.

Yet, this "large category of persons" was not entirely forgotten on Capitol Hill. The bill that gathered most support last term was that of Senator Birch Bayh, Democrat of Indiana, which required that any law enforcement official (federal, state, or local) had to get a subpoena whenever he went after putative evidence of a crime in the home or office of *any* innocent third party. Bayh's Privacy Protection Amendment did not, however, get out of committee. What Bayh does this term depends on whether or not he can reach agreement with the Justice Department, which has backed off considerably from its earlier position cheering on the Supreme Court in the *Zurcher* case.

On December 13, 1978, the Justice Department asked Congress to reverse part of the *Zurcher* decision by prohibiting police searches of certain categories of materials. Arguing the need for strengthened First Amendment protections—and ignoring the Fourth Amendment rights of the rest of the citizenry—the department called for special protection for any "work product" being prepared for publication, including broadcasting. Under this proposal there could be no search of the notes, drafts, files, tapes, photographs, films, or interviews of any journalist, author, scholar, professional free-lance writer, or anyone else engaged in any form of public communication. (The plan would curb federal, state, and local agents.)

If a prosecutor or the police want something in particular, a subpoena will have to be obtained. If the possessor of this "work product" resists the subpoena, there could be no search, although the resister might well be held in contempt of court. The only exception would be when the person having the alleged evidence is himself a suspect in the crime under investigation, or when a search is necessary "to prevent death or serious bodily injury to a human being." Although direct evidence of a crime, such as a ransom note, would not be considered a "work product," to get at something like that, a subpoena would also be necessary. There could be no surprise search.

The writing fraternity—from journalists to scholars—was much heartened by this Justice Department recognition of their special First Amendment privileges. To its credit, however, the *Washington Post* gave only two cheers: "The government has no business searching the belongings of lawyers, doctors, teachers or any other citizen for evidence that someone else committed a crime. The same kind of rules that apply to the press should apply to others who may possess confidential information."

Within the same week the President, joining the move to further dilute the *Zurcher* decision, asked the Justice Department to look into ways of protecting additional innocent third parties from surprise searches. Again, these would be selected classes of citizens: doctors and lawyers, maybe, but not "merchants, customers, bystanders."

FROM WHAT I'VE HEARD from sources in the Justice Department, there is much puzzlement as to how to expand the elite Fourth Amendment classes without angering unduly the FBI and other law enforcement agencies, including prosecutors throughout the country. The lawmen say, of course, that if the exciting opportunities opened to them by *Zurcher* are whittled down, they will end up being as hampered in their duties as they were before the decision.

Publicly, Assistant Attorney General Philip Heymann (who drafted the Justice Department's "work product" approach) has been complaining about how hard it is to balance further protections and the needs of the criminal justice system. It's easy, he said, to decide that a psychiatrist's files ought to be safeguarded from a police raid. "But what about surgeons?" Heymann went on. "And why not social workers? What about psychologists?"

But why not—in the name and the spirit of the Fourth Amendment—everybody?

"Oh no," a Justice Department attorney working on the problem told me, "this is not a Fourth Amendment matter. The Supreme Court already decided that in the *Zurcher* case."

Nonetheless, having been ordered to try to cast a protective net around other segments of the populace in the wake of *Zurcher*, the Justice Department is beginning with a design for doctors and lawyers. As in its concept of protecting the "work product" for practitioners of the First Amendment, the department is thinking in terms of safeguarding particular kinds of materials, rather than places, from searches. "If we can do that," a lawyer there says, "we'll move on to consider psychologists, social workers, and the like."

There is no discernible enthusiasm in the Justice Department, however, for exempting all innocent third parties from surprise raids. Indeed, it was with satisfaction that a department source told me in January that most of the members of Congress involved in

drawing up bills diluting *Zurcher* have cooled toward the notion of respecting the privacy of every single citizen. Among the holdouts are two members of the Judiciary Committee, Birch Bayh and Charles Mathias, the Republican senator from Maryland. The Justice Department intends to reason with them strenuously until "acceptable" statutes come forth.

As of now, in the Justice Department as well as among the majority of the Supreme Court, there is no echo of the warning of Lord Camden, in his 1765 decision denying that *any* magistrate had the power to authorize the seizure of *any* private papers: "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection," wrote Lord Camden, in words that laid the foundation for the Fourth Amendment, "and though the eye cannot, by the laws of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law," he asked, "that gives any magistrate such a power? I can safely answer, there is none."

There is now—in these United States. After the *Zurcher* decision, a county prosecutor in California asked an attorney for a document that his client, then under indictment, had given him. The lawyer said that the attorney-client privilege protected him from having to give up that paper. Instead of going after a subpoena, which would have allowed the defense attorney a chance to argue his claim of privilege in court, the prosecutor quickly and simply got a search warrant. The lawyer's office was ransacked—lawfully. The document was found, but not before the police had also looked through all the other files, many of which contained confidential information from and about other clients.

It is possible that this year or next, that lawyer and others of his class may have their privacy restored by federal law. But the "dearest property" of ordinary, innocent third parties will remain easy prey to those search warrants that James Otis, a Boston lawyer of the revolutionary period, called "the worst instrument of arbitrary power, the most destructive of English liberty."

LAW

WALTER BOWART

The FBI vs. Scientology

ON AUGUST 14, 1978, A federal grand jury in Washington, D.C., indicted 11 members of the Church of Scientology on charges of conspiracy, theft of government property, obstruction of justice, and burglary. Among them was the founder's wife, Mary Sue (Mrs. L. Ron) Hubbard. On August 29, all pleaded "not guilty" to the government's charges.

The indictments followed one of the largest FBI raids in history. On July 8, 1977, more than one hundred FBI agents armed with buzz saws, sledge hammers, and crowbars broke into the church's offices in Washington and Los Angeles in simultaneous raids. For 20 hours the agents combed the two offices and rifled files and personal effects, searching for documents that church members allegedly stole from government files. "It was gangbusters all over again," commented James J. Kilpatrick in his nationally syndicated column.

Although a search warrant listed 150 documents held in specific church files, the agents searched the entire premises and took with them at least 23,000 documents from the Los Angeles office alone. Some of the papers the FBI seized revealed crimes committed by employees of the Drug Enforcement Administration and the Justice Department. Others documented what the church alleges has been a 28-year campaign of misinformation and harassment waged against it by the government.

Church spokesmen say the FBI also gathered up confidential correspondence between the church and its attorneys regarding a massive class action lawsuit that it filed against several government agencies only five months earlier. That suit, for $750 million in damages, accuses officials of the FBI, CIA, National Security Agency, Justice Department, Treasury Department, army, Postal Service, and International Criminal Police Organization (Interpol) of conspiring since 1956 to abridge the civil and constitutional rights of Scientologists. The suit alleges that government agencies used informers, infiltrators, and illegal wiretapping and mail surveillance to compile dossiers on the church; that the agencies disseminated unverified, irrelevant, and false information to other government departments, foreign governments, and private organizations and individuals; and that the IRS subjected the church to discriminatory audits and other forms of harassment.

The FBI raid added a new dimension to the church's legal battle with the United States government. Within two weeks of the raid, church attorneys succeeded in convincing a federal judge in Washington, D.C., that the FBI search warrant was illegally broad. "In my view this warrant . . . invited the agents to seize any documents in the Church's files that struck their fancy," wrote Justice William Bryant on July 27, 1977; ". . . the sweep of that discretion is constitutionally intolerable." The Court of Appeals for the D.C. Circuit later reversed Bryant, and the Supreme Court declined to review the case. But the U.S. Court of Appeals for the Ninth Circuit early last November granted a motion by the church and enjoined the Justice Department from "disseminating the seized materials or information obtained therefrom to other government agencies or the public."

That ruling came too late to stop the FBI from releasing to the media the details of its case against the church. *People* magazine, for example, in its August 14 issue, carried an article entitled "Federal Prosecutors Unveil the Astonishing Intrigues of the Scientology Church." It appeared on the same day the grand jury indictment was announced, and must therefore have been based on leaked information.

*THE CHURCH HAS ENER*getically waged its own media campaign against the government. Shortly after the raid on the Scientology offices, the Justice Department released an index of the rec-

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