Sunshine and Ill Wind: The Forecast for Public Access to Sealed Search Warrants

Peter G. Blumberg

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol41/iss2/6

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
SUNSHINE AND ILL WIND: THE FORECAST FOR PUBLIC ACCESS TO SEALED SEARCH WARRANTS

INTRODUCTION

In order for American citizens to engage in intelligent debate and to make expedient political choices, it is essential that they have knowledge of their government's activities. To ensure a knowledgeable electorate, the public has been given access, either through statute or by the courts, to governmental functions and documents such as congressional hearings, memoranda of government agencies, and criminal trials. However, the public also has had lim-

1. See Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (stating that in order to be valuable, public debate must be informed); Saxbe v. Washington Post, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny."). As the Solicitor General noted:

[The] first amendment is one of the vital bulwarks of our national commitment to intelligent self-government. It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed.

Id. (citation to petitioner's brief omitted).

2. In most public access cases, media outlets such as television broadcasters or newspapers are the parties seeking access to government-held information. See, e.g., Estes v. Texas, 381 U.S. 532 (1965). The media, however, is treated like a member of the public according to the prevailing court analysis. Id. at 533. Thus the media gets no special access rights as far as the First Amendment is concerned. In Estes, the Court held that the publicity surrounding the defendant's trial violated his due process right to a fair trial. The Court, in its opinion, stated:

Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.

Id. at 589. But see Gannett Co. v. DePasquale, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring) (advancing special access rights for the press, finding that the press "'acts as an agent of the public at large,' each individual member of which cannot obtain for himself 'the information needed for the intelligent discharge of his political responsibilities.'" (quoting Saxbe, 417 U.S. at 863 (Powell, J., dissenting)); Tom A. Collins, The Press Clause Construed in Context: The Journalists' Right of Access to Places, 52 Mo. L. REV. 751 (1987) (advocating special access rights for the media).

3. "Access" means both the ability to review government records as well as the ability to actually attend a governmental function.

4. There exist both state and federal access statutes that function to guarantee access to government-held information. See Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988) (outlining the duty of government agencies to make available agency rules, opinions, orders, records, and proceedings); 2 BURT BRAVERMAN & FRANCES J. CHETWYND, INFORMATION LAW: FREEDOM
ited access rights to areas such as federal prisons or grand jury proceedings when the value of public access is outweighed by governmental interests. Our nation’s judicial system, which protects the rights of citizens and adjudicates their disputes, is a bulwark of a free and democratic government. Since the judiciary plays such an important role in our society, the public has often sought access to judicial proceedings and records. Access to the American court system has been the focus of several Supreme Court decisions in the past decade. During this period, the Court has recognized that the public has a qualified First Amendment right of access to trials and certain pretrial proceedings. However, the Court has yet to determine whether there is a qualified First Amendment right of access to judicial records, a right guaranteed to a lesser degree by the common law.

OF INFORMATION, PRIVACY, OPEN MEETINGS, OTHER ACCESS LAWS, 18th app. at 113-17 (1985) (listing state open record statutes). Courts have guaranteed access to governmental processes such as trials. See infra notes 58-60 and accompanying text (discussing Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)).

5. See Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that the media has no right of access to prisons beyond that allowed to the public generally).

6. Gannett, 443 U.S. at 397 n.1 (Powell, J., concurring) (noting that “grand jury proceedings traditionally have been held in strict confidence”); id. at 437 (Blackmun J., concurring in part and dissenting in part) (commenting on the secrecy surrounding grand jury proceedings). But see Butterworth v. Smith, 110 S. Ct. 1376, 1381-82 (1990) (invalidating a Florida law prohibiting a witness from disclosing his or her own testimony after the grand jury has been discharged). See generally JOHN J. WATKINS, THE MASS MEDIA AND THE LAW 283 (1990) (reviewing the status of access rights to grand juries).

7. See Gannett, 438 U.S. at 400-02.


9. See id. (implying that the public exercises its access rights as a check and balance on the courts). See generally Landmark Communications v. Virginia, 435 U.S. 829, 830 (1978) (newspaper seeking access to judicial review commission); Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 541 (1976) (media seeking access to a criminal defendant’s pretrial confessions and admissions); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 473 (1975) (where a rape victim’s name was taken from the judicial records and publicized by a media broadcaster); Sheppard v. Maxwell, 384 U.S. 333, 344 (1966) (where media gained access to criminal trial).

10. The Court first recognized the qualified First Amendment right of access to trials in Richmond Newspapers, 448 U.S. at 555. This qualified right was extended to pretrial proceedings in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I).

The Supreme Court has always been more willing to find rights of access to courts, rather than to other governmental functions. One year before finding a right of access to trials in Richmond Newspapers the Court denied access to federal prisons in Houchins v. KQED, Inc., 438 U.S. 1 (1978). Justice Stevens in his Richmond Newspapers concurrence noted the Court’s inconsistency in these two cases, especially considering that access to prisons would help protect one of the weakest segments of the country (prisoners) and that the access to prisons was denied despite the lack of a legitimate justification for closure, whereas granting access to trials protected the most powerful voice in the community, the media. Richmond Newspapers, 448 U.S. at 583-84 (Stevens, J., concurring).

11. The Court ruled in Nixon v. Warner Communications, 435 U.S. 589 (1978), that no First Amendment right of access to judicial records existed, although a common law right of access to judicial records existed. Id. at 597-99; see infra notes 118-21 and accompanying text (discussing the legal differences between a First Amendment right of access and a common law right of access). The validity of the Nixon Court’s determination that no First Amendment right of access
As the courts gradually clarified a constitutional right of access to trials, the public has sought to broaden that right to include judicial documents and judicial proceedings other than trials. Among the judicial documents the public has sought access to are executed search warrants, particularly those relating to massive government investigations. Public access to sealed search warrants has been the subject of much recent litigation; in the last few years several circuit courts of appeals have reviewed access requests from media petitioners to sealed search warrants that have been executed on persons who had not yet been charged with crimes.

Unfortunately, these courts have used dissimilar analyses to determine whether a qualified right of access to search warrants exists, and they have reached varying conclusions on the question. In these cases the search warrants were sealed by the issuing court or magistrate pursuant to a governmental request at the post-execution, pre-indictment stage. The media petitioners then sought to have the sealing orders revoked, so that the information in the search warrants and their accompanying affidavits could be disseminated by

to judicial records exists is questionable following the holdings of Richmond Newspapers and its progeny. See infra note 116 and accompanying text.

12. Lower courts have extended the right of access to other proceedings and documents on occasion. See Seattle Times Co. v. United States Dist. Court, 845 F.2d 1513, 1516-17 (9th Cir. 1988) (pretrial detention hearings); In re Washington Post, 807 F.2d 383, 389 (4th Cir. 1986) (plea and sentencing hearings); Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pretrial documents in general).

13. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 62 (4th Cir. 1989) (a newspaper seeking information on a governmental investigation of fraud in the health care industry); Times Mirror Co. v. United States, 873 F.2d 1210, 1211 (9th Cir. 1989) (a newspaper seeking information on a governmental investigation of fraud in a defense contracting company); In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 571 (8th Cir. 1988) (same).

14. Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989); Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989); In re Search Warrant for Secretarial Area Outside office of Gunn, 855 F.2d 569 (8th Cir. 1988).

15. See Baltimore Sun, 886 F.2d at 63-65 (finding a common law right of access but no First Amendment right of access); Times Mirror, 873 F.2d at 1217-19 (finding no First Amendment or common law right of access); In re Gunn, 855 F.2d at 571 (finding a First Amendment right of access).

16. Generally the government does not file search warrants under seal and thus the media normally has access to them. However, litigation resulted because of the sealing orders in these particular cases. Some fear exists that without higher court messages discouraging lower courts from entering the sealing orders, the government will request sealing orders on all search warrants, regardless of how they perceive the importance of secrecy under the circumstances. Some courts have commented that sealing orders requested by the government are already “proliferating,” thus denying the press a freedom to report on governmental activities. See Seattle Times Co. v. Eberharter, 713 P.2d 710, 717-18 (Wash. 1986) (Andersen, J., concurring) (citing Kevin C. Dwyer & Peter G. Rush, Note, Developments Under the Freedom of Information Act—1983, DUKE L.J. 377 (1984)). The proliferation of sealing orders has certainly occurred in civil courtrooms, particularly in the area of complex litigation where sealing orders can cover all pretrial discovery material, the contents of pleadings, trial testimony, trial exhibits, and terms of settlement. See Brian T. FitzGerald, Note, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J.L. & POL. 381, 382-83 (1990) (criticizing the increased use of sealing orders in civil litigation).
The disclosure of the warrants and affidavits was opposed, in most instances, by the government and the searched, unindicted individuals. Thus, in the typical search warrant access case, the public, the government, and the searched individual all have separate interests they seek to protect. The media, acting as an arm of the public, asserts an interest in preserving the American system of self-government that would be facilitated by open access to governmental functions and documents, such as sealed search warrants. On the other hand, the government typically resists access, declaring an interest in criminal investigations and prosecution. A third interest exists in the form of the searched individual's privacy concern. The search warrant access cases provide a unique conflict between some of the most esteemed values treasured by the citizens of this country: their right to know, their right to privacy, and their ability to live in a crime-free society.

Section One of this Comment traces the history of the "right to know" doctrine and will demonstrate how courts have found both a First Amendment and common law right of access to judicial proceedings, and a common law right of access to judicial documents. Section One then examines the right of access to sealed search warrants and the various interests involved in the typical search warrant access case. Section Two analyzes the various methodologies used by courts in the search warrant access cases to determine access rights and to evaluate critically the divergent interests of the media, the government, and the searched individual. Section Two then argues that the framework used by courts for determining the value of a right of access to sealed search warrants is inappropriate, and that a presumption of access to the warrants under a common law right of access should exist. Section Two further contends that the common law right of access merits strict application, so that any requests to sealed documents such as search warrants would be closely scrutinized. Finally, Section Two discusses the impact that the current system of access determination has on our self-government principles and why access is fundamental to a representative democracy.

I. BACKGROUND

A. Constitutional Basis for a Right to Know

The right of access to courts emanates from the idea that the public has a right to know. Scholars specializing in self-government and free speech theory argue that the right to know is important for a representative democracy because the only way citizens can govern themselves is to "know" about their political institutions. The Supreme Court accepted the views of these scholars when it gave constitutional endorsement to the right to know.

17. Times Mirror, 873 F.2d at 1211-12; In re Gunn, 855 F.2d at 571.
18. See Times Mirror, 873 F.2d at 1211-12; In re Gunn, 855 F.2d at 571.
19. See infra notes 22-27 and accompanying text (discussing Alexander Meiklejohn's position that freedom of speech is a necessary corollary to the American system of self-government).
1. Philosophical Underpinnings

Traditionally the public's interest in, and right to, information has emanated from the First Amendment. Although the First Amendment draws its values from various sources, the philosophical basis of the First Amendment that is most relevant to access issues relates to the public's interest in self-government. This line of thought is most often associated with Alexander Meiklejohn. Meiklejohn argued that freedom of speech is a necessary corollary to the American system of self-government. He contended that citizens control the country through their votes and if they do not have the proper knowledge of government their votes will not be well executed. Although Meiklejohn never specifically extended his argument to require access to government institutions, other commentators have argued that acquisition of information through access is a prerequisite for the public to act in their interests for self-government. Without access to information, important aspects of freedom of speech and freedom of the press would be "eviscerated." To achieve the ideals of self-government, the government must not only ensure open channels of speech but also ensure access so that relevant information can flow through those channels.

2. The Supreme Court and the Public's Right to Know

The Supreme Court first recognized the public's right to know in *Grosjean v. American Press Co.* In *Grosjean,* the Court struck down a Louisiana state tax on newspapers, holding that the tax would have the effect of restricting the public's access to information and knowledge. The Court based its holding on the First Amendment's intended protection of "such free and general dis-

---

20. The relevant part of the text reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ." U.S. Const. amend. I.
22. See generally Alexander Meiklejohn, Free Speech and its Relation to Self-Government (1948) (arguing that governing must be done by the governed through their rights of self-expression).
23. Id. at 26.
24. Id.
25. See Thomas I. Emerson, Legal Foundations of the Right to Know, Wash. U. L.Q. 1, 14-20 (1976) (arguing that the public must have all information available in order to exercise its sovereign rights over the government); Michael J. Hayes, Note, What Ever Happened to "The Right To Know"?: Access To Government-Controlled Information Since Richmond Newspapers, 73 Va. L. Rev. 1111, 1113 (1987) (stating that the right to know derives from a citizen's right to participate in the democratic process).
27. See, e.g., Hayes, supra note 25, at 1113 (warning that when citizens vote without full information, the welfare of the nation is threatened).
29. Id. at 249.
discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." This theory was instrumental in later Court findings that citizens have a right to receive information in terms of personal correspondence, political and religious material, commercial information, pornography, and information and ideas generally. However, the "right to acquire" information had not received as much attention from the Court until the 1980s, when the cases concerning judicial proceeding access were decided.

B. Basis for Public Access to Judicial Proceedings

Although Americans have attended criminal trials since colonial times, they have never had an express right to do so. Therefore, courts have the ability to close certain proceedings to the public when they find it necessary. Courts justify the closure by holding that public access would violate a defendant's due process right to a fair trial. Courts reject arguments that the Sixth Amendment right to a public trial can be exercised by the public as well as the defendant. Eventually, courts began to accept a First Amendment self-government theory for a right of access.

30. Id. at 250.
32. See Lamont v. Postmaster Gen. of the United States, 381 U.S. 301 (1965) (striking down a law that allowed the Postal Service to detain mailings of "communist political propaganda").
33. See Marsh v. Alabama, 326 U.S. 501 (1946) (holding that the state could not prevent a person from distributing religious literature on streets of company-owned town since the town was freely accessible to the public); Martin v. City of Struthers, 319 U.S. 141 (1943) (holding a law banning solicitors from going house-to-house with religious announcements violative of the First Amendment).
36. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC "fairness doctrine" that requires broadcasters to give fair coverage to both sides of public issues).
37. See Gannett Co. v. DePasquale, 443 U.S. 368, 378-94 (1979) (holding that the United States Constitution does not grant a third party the right of access to pretrial proceedings when the parties agree to close the trial).
38. See Sheppard v. Maxwell, 384 U.S. 333 (1966) (reversing a murder conviction since prejudicial pretrial and trial publicity denied the defendant a due process right to a fair trial).
39. See infra notes 42-45 and accompanying text (discussing Gannett, 443 U.S. 368).
40. Gannett, 443 U.S. at 379 (holding Sixth Amendment right to a public trial exists for the benefit of a criminal defendant only, not for the public in general); see Faretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting) ("[T]he specific guarantees of the Sixth Amendment are personal to the accused . . . ").
41. See infra notes 58-69 and accompanying text (discussing Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)).
1. Sixth Amendment Access Analysis

In the past fifteen years the Supreme Court has set the modern guidelines for cases concerning public access to judicial proceedings. The first significant case concerning public access to courts that discussed a First Amendment theory was Gannett Co. v. DePasquale. In Gannett, a New York criminal trial court had granted the defendant's uncontested motion to close a pretrial suppression hearing to the public. The Supreme Court upheld the order, stating that the Constitution does not grant a third party an affirmative right of access to pretrial proceedings when all parties agree to close the trial. The Court reasoned that the defendant's due process right to a fair trial would be violated by pretrial publicity caused by public access, and that the Sixth Amendment right to a public trial was for the defendant's benefit only and could not be asserted by the public, and that there was no historical basis for pretrial access.

In Gannett, the Court paid close attention to the traditions of access to judicial processes, a procedure they would repeat in other access cases. The Court examined the history of public access to trials and pretrial proceedings. It acknowledged that a common law rule of open trials had historically existed, but found that traditionally pretrial hearings could be closed to the public pursuant to a defendant's request. It also applied an historical analysis to determine whether the drafters of the Constitution intended to give the public a general right of access to trials under the Sixth Amendment. The Court concluded that there was no such intention.

The majority opinion only examined the defendant's Sixth Amendment right to a public trial in making the access determination. The Court declined to look to the First Amendment for a public right of access, holding that the eventual release of the transcript of the proceeding rendered the issue

42. 443 U.S. 368 (1979).
43. Id. at 376.
44. Id. at 378-94.
45. Id. at 378.
46. Id. at 379.
47. Id. at 389.
48. The Court examined the traditions of access to trials and pretrial proceedings both in the United States and in England. Id. at 389-90. The English distinguished "preliminary or prefatory stages of the proceedings," which could be closed to the public, from actual trials, which must remain open to the public. Id. at 389 (quoting EDWARD JENKS, THE BOOK OF ENGLISH LAW 75 (6th ed. 1967)). The Court also examined the New York Code of Criminal Procedure published in 1850. This Code provided that pretrial proceedings could be closed to the public upon the defendant's request. Id. at 390 (quoting COMMISSIONERS ON PRACTICE AND PLEADING, CODE OF CRIMINAL PROCEDURE, § 202 (Final Report 1850)).
49. Gannett, 443 U.S. at 384-87. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.
50. Gannett, 443 U.S. at 384-91.
51. Id.
moot. Justice Powell, in his concurrence, did address the First Amendment issue that the majority refused to rule on, and was the only member of the Court to support a limited right of access to judicial proceedings under the First Amendment. Justice Powell reasoned that since the First Amendment protected the public's interest in "having accurate information concerning the operation of its criminal justice system," he would recognize a qualified First Amendment right of access to trials. However, he pointed out that a qualified right, by definition, is not absolute, and must be balanced against competing interests. Justice Powell then balanced the qualified right of access against both the defendant's Sixth Amendment right to a fair trial free from publicity, and the government's interests in obtaining just convictions and maintaining the confidentiality of its information and informants. Applying this balance, he found the interests of the defendant and the government superior to the qualified right of access, and thus voted to affirm the closure order.

2. First Amendment Analysis: Preliminary Framework for Access to Trials

Justice Powell's concurrence in Gannett presaged the course that the Supreme Court would follow in future access cases. One year after Gannett, the Court decided Richmond Newspapers v. Virginia, and the First Amendment qualified right of access to courts was created. In Richmond Newspapers, the Court reviewed a request by media petitioners for access to a murder trial where the petitioners had been excluded pursuant to the defendant's uncontested motion. Seven members of the Court agreed that the public deserves some sort of access to the courts at trial stages. However, six separate concurrences were filed and thus a general framework for lower courts was not set up. Chief Justice Burger's opinion stated that the First Amendment guaranteed a limited right of access to trials. In reaching this conclusion, the Chief Justice emphasized the historical tradition of open access, relying on this history of access as evidence that access is an "indispensable attribute of the Anglo-American trial." In finding an historical basis of access to trials, Chief Justice Burger traced the traditions of court access in England from the Norman invasion to the present, and examined how these traditions influenced the
Chief Justice Burger conceded that no part of the Constitution specifically required open access to trials, but he found that many modern rights were not specifically provided for in the Constitution. This finding of an implied right within the First Amendment circumvented the reasoning from *Gannett* that resisted finding an implied right within the Sixth Amendment. Chief Justice Burger shifted the focus of his analysis from the defendant's Sixth Amendment right to a public trial to the public's First Amendment right to know, and found that access to trials fostered the freedom of speech, press, and assembly, expressly guaranteed by the First Amendment. Thus the Chief Justice reasoned that the existence of these "express" rights required the protection of the "implied" right of public access to trials. However, Chief Justice Burger cautioned that the right of access is not absolute, so that an "overriding interest articulated in findings" would allow a closure order to stand. Chief Justice Burger indicated that a defendant's Fourteenth Amendment right to a fair trial might on occasion constitute an "overriding" interest, but that ordinarily, jury sequestration or other alternatives would diminish the adverse effects publicity may have on a defendant's right to a fair trial.

Rather than finding another implied right emanating from the First Amendment as Chief Justice Burger did, Justice Brennan's concurrence concluded that the First Amendment itself explicitly guaranteed a qualified right of access to trials. Justice Brennan argued that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." Justice Brennan's structural model links the First Amendment to all forms of communication that are necessary for a democracy to survive. Therefore, the structural aspects of the First Amendment would include the right to receive or acquire information

64. *Id.* at 565-73.
65. *Id.* at 579-80. Chief Justice Burger further stated:

Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights.

*Id.*

66. The *Gannett* Court felt constrained by the framers' intent that the Sixth Amendment right to a public trial could only be exercised by defendants, and not by the public itself. *Gannett Co. v. DePasquale*, 443 U.S. 379, 384-87 (1979). The *Richmond Newspapers* Court did not feel restrained by the framers' intent. *Richmond Newspapers*, 448 U.S. at 579.
68. *Id.* at 581.
69. *Id.*
70. *Id.* at 585 (Brennan, J., concurring).
71. *Id.* at 587 (Brennan, J., concurring).
72. *Id.* at 588 (Brennan, J., concurring).
since this type of communication better enables citizens to govern themselves.\textsuperscript{73}

To determine whether the qualified First Amendment right of access should exist in a particular case, Justice Brennan foreshadowed later Court analysis of access questions by evaluating both the historical traditions of access to trials, as well as the functional advantages of access.\textsuperscript{74} If a process had been publicly accessible throughout history, and if access benefitted the process, then a First Amendment qualified right of access exists.\textsuperscript{75} Justice Brennan justified the examination of historical standards for access cases by noting that "the Constitution carries the gloss of history" and that "a tradition of accessibility implies the favorable judgment of experience."\textsuperscript{76} In applying this two-pronged standard to the case at hand, Justice Brennan found that traditionally trials have been open, and that access is important to the broad purposes of the trial process. Thus, Justice Brennan found a qualified right of access under the First Amendment.\textsuperscript{77} When balancing the qualified right of access versus other competing interests, Justice Brennan found no interest in the case compelling enough to justify closure of the trial.\textsuperscript{78}

3. First Amendment Analysis: General Acceptance of a Qualified Right of Access to Trials

Two years later, a majority of the Court finally accepted the First Amendment theory of access. In \textit{Globe Newspaper Co. v. Superior Court},\textsuperscript{79} Justice Brennan, speaking for the majority, struck down a Massachusetts law that denied public access to any trial testimony of minors who are alleged victims of sexual abuse.\textsuperscript{80} \textit{Globe} was also significant for shedding light on what might constitute an "overriding interest" that would outweigh the presumption of access that the First Amendment guarantees if a qualified right of access is found.\textsuperscript{81}

In determining that the media had a qualified right of access to this proceeding, Justice Brennan relied on his reasoning in \textit{Richmond Newspapers} that the historical and functional aspects of access to this proceeding should be examined.\textsuperscript{82} If the hearing was historically open to the public,\textsuperscript{83} and openness

\textsuperscript{73} Id. (Brennan, J., concurring).
\textsuperscript{74} Id. at 589 (Brennan, J., concurring).
\textsuperscript{75} Id. (Brennan, J., concurring).
\textsuperscript{76} Id. (Brennan, J., concurring).
\textsuperscript{77} Id. at 598 (Brennan, J., concurring).
\textsuperscript{78} Id. (Brennan, J., concurring). Although Justice Brennan discovered no compelling interest to exist in this case, he speculated that a national security interest would probably overcome the First Amendment concerns. \textit{Id.} at 598 n.24 (Brennan, J., concurring).
\textsuperscript{79} 457 U.S. 596 (1982).
\textsuperscript{80} Id. at 598.
\textsuperscript{81} Id. at 605. Justice Brennan argued that the history of access should be examined since "the Constitution carries the gloss of history" and that logic dictates that if access contributes to the function of a process then access should be permitted. \textit{Id.} at 605-06.
\textsuperscript{82} This case provided the first opportunity for the Court to disagree in its interpretation of
contributed to the hearing process, then a qualified right of access exists.

After finding a qualified right of access, the Court balanced that right versus the state's asserted interests. In this case the state's interest was in protecting the privacy of minors who were sexual abuse victims, and encouraging confidentiality so that more victims of abuse would come forward to testify in court. The Court gave an indication of what might constitute a compelling interest strong enough to overcome the First Amendment interests when it balanced these various concerns. It found that a minor's privacy interest is compelling. However, the interest must be particularized to the case at bar and it cannot be speculative. Here, the state failed to prove that the particular child involved in this case would suffer a privacy harm, and it failed to prove convincingly that law enforcement would be enhanced with the closure. Therefore, the Court rescinded the sealing order.

4. Extension of the Right of Access Outside the Traditional Trial Stages

The Court next examined access to a different aspect of the trial process, voir dire. In Press-Enterprise Co. v. Superior Court (Press-Enterprise I), the press sought access to voir dire in a defendant's criminal trial for the rape

history. Chief Justice Burger, in his dissent, accused Justice Brennan of ignoring "a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." In Richmond Newspapers to Globe. In Richmond Newspapers the contribution of access had to be for the particular process itself while in Globe Justice Brennan concluded that the right of access must play a significant role in the functioning of the judicial process or the government as a whole. See Richmond Newspapers v. Virginia, 448 U.S. 555, 593-94 (1980) (Brennan, J., concurring); Globe, 457 U.S. at 605-06. Significantly, this has led to confusion among lower courts on how to apply the test--specifically, whether they should examine the effect on a particular process or the judicial process as a whole. See Hayes, supra note 25, at 1134-35.

84. Id. at 605-06. Justice Brennan changed his original position on the functional analysis from Richmond Newspapers to Globe. In Richmond Newspapers the contribution of access had to be for the particular process itself while in Globe Justice Brennan concluded that the right of access must play a significant role in the functioning of the judicial process or the government as a whole. See Richmond Newspapers v. Virginia, 448 U.S. 555, 593-94 (1980) (Brennan, J., concurring); Globe, 457 U.S. at 605-06. Significantly, this has led to confusion among lower courts on how to apply the test--specifically, whether they should examine the effect on a particular process or the judicial process as a whole. See Hayes, supra note 25, at 1134-35.

85. Globe, 457 U.S. at 606. After balancing the parties' interests, the Court rescinded the closure order, holding that the public's right of access was not outweighed by the state's interest in shielding allegedly sexually abused children from the media spotlight, absent a particularized finding that the minors would be harmed by the publicity. Id. at 610.

86. Id. at 607.

87. Id. The Court indicated that the state's law enforcement interest also might be compelling. Id. at 609.

88. Id. at 608-09. Specifically, the Court would not allow a general closure law whenever child victims are involved in a case. The Court demanded that the state prove the child involved in this particular case would suffer an invasion of privacy to such an extent that it would cause emotional trauma. Id. at 608. For the state's interest in law enforcement to be found compelling, the Court required empirical proof that closure would enhance law enforcement. Here, it held that the state was only speculating on potential benefits to law enforcement from closure orders. Id. at 609.

89. Id. at 609-10.
90. Id. at 611.
92. Actually, the press sought access to a transcript of the voir dire proceeding, but the Court approached the access request as one to the voir dire proceeding itself, not the document emanating from it, when deciding the issue of whether a qualified right of access existed. See id. at 503.
and murder of a teenage girl. The prosecution objected to public access to the proceeding, fearing that press coverage of the process would hinder juror candor and thus prevent a fair trial. The Supreme Court rejected the state's claim for closure of voir dire. The Court cited the historical evidence of access to juror questioning and stressed the fairness of a public trial and the appearance of fairness that an open trial provides. The Court reiterated that the right of access is not absolute, but could be overcome by a showing of higher values that are narrowly tailored to serve that interest. The Court did not find a compelling interest present in this case. Significantly, it did note that a juror's privacy interest might be compelling when a juror is asked to reveal information that is embarrassing or could cause emotional trauma. This case is significant as it was the first time the Court protected access to a proceeding not in the traditional trial stages.

5. The Two-Pronged Test of the First Amendment Right of Access

The next prominent case finally crystallized a definitive standard for analyzing public access questions. In Press-Enterprise Co. v. Superior Court (Press-Enterprise II), petitioner newspaper sought access to a transcript from a forty-one day preliminary hearing in a sensational murder trial that had been closed to the public. The Supreme Court allowed access to the transcript in an opinion by Chief Justice Burger. Although the media petitioners in this case sought access to the preliminary hearing transcript, which is essentially a judicial document, the Court looked beyond the document and treated the access request as one to the preliminary hearing itself, rather than any documents it might produce.

The Press-Enterprise II Court firmly embraced the two-pronged test proposed by Justice Brennan's concurrence in Richmond Newspapers. In applying this test, the Court first examined the historical basis of access and then ex-

93. Id.
94. Id.
95. Id. at 513.
96. Id. at 505-08.
97. Id. at 508-09.
98. Id. at 511.
99. Id. at 512. Justice Blackmun concurred in this decision, withholding complete support because he was apprehensive of the Court's language concerning the privacy rights of jurors. Justice Blackmun cautioned that carving out a privacy right for potential jurors could cause havoc in courtrooms as jurors might consistently refuse to answer questions, invoking their privacy rights. Id. at 515 (Blackmun, J., concurring).
100. 478 U.S. 1 (1986).
101. Id. at 3. Defendant was a nurse charged with murdering twelve patients by administering to them massive doses of the heart drug lidocaine. Id.
102. Id. at 5.
103. Id. at 6.
104. Id. The Court took a similar approach in Press-Enterprise I, where it treated an access request to a voir dire transcript as an access request to voir dire itself. See supra note 92.
amined the contribution that access would make to the function of the particular process in question. If a court finds that, historically, the process has been accessible to the public, and that access would provide a positive contribution to the process, then a qualified right of access exists. If a qualified right of access is found, any argument in support of closure would have to pass a strict scrutiny test. Closure must be essential in order to uphold higher values, and it must be narrowly tailored to serve those values. In applying the two-pronged test here, the Court found that, historically, preliminary hearings in California were open, and that the preliminary hearing would benefit from access since it was often the most important or final step in the trial process. Thus, a qualified right of access to preliminary hearings existed in Press-Enterprise II. When applying the strict scrutiny standard to the interests asserted against the qualified right of access, the Court did not find any state interest compelling enough to overcome the right of access.

Thus, under the current state of the law governing access to judicial proceedings, the two-pronged Press-Enterprise II standard is applied to proceed-

105. Press-Enterprise II, 478 U.S. at 8. Note that the Court accepted Justice Brennan's analysis from Richmond rather than Globe and limited the contribution analysis to the process itself rather than society as a whole. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-06 (1982); see also supra note 84 (discussing Justice Brennan's analysis).


108. There is some dispute as to whether this holding is limited to California hearings or whether it opened up preliminary hearings throughout the United States. The Court referred to preliminary hearings as conducted in California several times, so arguably the holding is limited to California and states with preliminary hearing systems like California's. See Press-Enterprise II, 478 U.S. at 10-13. However, most lower courts have read the opinion to apply to all preliminary hearings. See Anne Albright, Note, Press-Enterprise, Inc. v. Superior Court of California for the County of Riverside, 24 AM. CRIM. L. REV. 379, 401-02 (1986) (recommending that defense attorneys in states with preliminary hearing procedures different from California's distinguish Press-Enterprise II when seeking closure of their clients' preliminary hearings).

109. Press-Enterprise II, 478 U.S. at 10. As in Globe, there was also a disagreement on historical interpretation here. Justice Stevens, in his dissent, assailed the assertion by the majority that pretrial hearings are traditionally open. Id. at 21 (Stevens, J., dissenting). Indeed, this decision is inconsistent with Gannett where the majority relied on the lack of access to preliminary hearings as a basis to deny the petitioner's requests. See Gannett Co. v. DePasquale, 443 U.S. 379, 389-90 (1979). Justice Stevens assumed that the majority was not limiting itself to preliminary hearings in California. See Press Enterprise II, 478 U.S. at 21-24 (Stevens, J., dissenting).


111. The Court indicated that a defendant's Fourteenth Amendment right to a fair trial might be compelling enough to outweigh a First Amendment right of access, but the defendant would have to prove there was a "substantial probability" that his rights would be violated. Id. at 13.

Most case law indicates that there are many procedures to be employed by a trial judge to ensure that the defendant's Fourteenth Amendment rights and the public's access rights can be upheld concurrently. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court suggested that trial judges could take many steps to protect a defendant's rights short of closure, such as: jury sequestration; warnings to witnesses and jurors to avoid reading newspapers or watching television; warnings to parties and attorneys not to encourage media sensationalism; delay of the trial until publicity subsides; or relocation of the trial. Id. at 333-363.
ings to determine whether a First Amendment qualified right of access exists. The two-pronged test requires a finding of historical access as well as a finding of a contribution to the process. The "history of access" prong requires courts to trace English and American traditions to determine whether particular hearings have been accessible in the past. The "contribution to function" prong requires an examination of the advantages access might provide to a particular proceeding as well as the benefits afforded to society in general. If the requirements for both prongs are met, then a qualified right of access exists. However, this right must be balanced with other compelling interests that are narrowly tailored to serve the particular interest. In assessing what might constitute a compelling interest, the Court has indicated that a defendant's right to a fair trial, and possibly his privacy rights, would meet this requirement.

C. Basis for Public Access to Judicial Documents

The two-pronged test designed in Press-Enterprise II is tailored for determinations of the right of access to certain judicial proceedings. However, it is unclear whether the two-pronged test extends to determinations of the right of access to judicial documents. The Supreme Court, upon finding a qualified right of access to the judicial proceedings, has never directly addressed the issue of whether the First Amendment guarantees the public a right of access to judicial documents. In several of the judicial proceeding cases, the petitioners actually sought access to documents, but the Court analyzed the issue by looking at the process that produced the sought-after document. Thus,

112. Note that the Court has altered its position on the requirement of a contribution to society in general. See supra notes 84, 105 and accompanying text. Many lower courts look to both the contribution to the function as well as the contribution to society in general.


114. Most courts view search warrants as judicial documents. The Baltimore Sun court reasoned that the warrant is a judicial document because the judicial officer must file the warrant and all papers connected with it with the clerk of the court. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 63-64 (4th Cir. 1989) (citing Fed. R. Crim. P. 41(g)); see also In re Newsday, Inc., 895 F.2d 74, 77 (2d. Cir. 1990) ("Search warrants and the affidavits that precede their issuance are public documents required by Rule 41 of the Federal Rules of Criminal Procedure to be filed with the clerk of the issuing court.")

Rule 41(g) provides: "The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized." Fed. R. Crim. P. 41(g).


116. The Court in Nixon v. Warner Communications, 435 U.S. 589 (1977), held that the First Amendment did not guarantee access to judicial documents since there was no precedent for such a reading of the First Amendment. Id. at 609. Commentators have suggested that a precedent may exist for such a right after the holdings in Richmond Newspapers and Press-Enterprise II where the Court found a qualified right of access to judicial proceedings. See MARC A. FRANKLIN & DAVID A. ANDERSON, MASS MEDIA LAW 737-38 (4th ed. 1990) (reviewing court access cases).

117. For instance, in Press-Enterprise II petitioners sought access to a preliminary hearing.
the Supreme Court has never applied the two-pronged Press-Enterprise II test to judicial documents themselves to determine whether a qualified right of access to such documents exists.

However, the Court has recognized a distinct common law qualified right of access to judicial documents.\(^{118}\) Courts have recognized this common law right because public scrutiny of judicial documents enlightens public opinion, safeguards justice, and promotes confidence in the judiciary.\(^{119}\) The difference between a First Amendment right of access and one guaranteed by the common law revolves on the strength of the presumption of access. A denial of access is much more likely if the petitioner only has a common law right of access as opposed to a right emanating from the First Amendment. A First Amendment right of access can be denied only by proof of a "compelling governmental interest" and proof that the closure order is "narrowly tailored to serve that interest."\(^{120}\) In contrast, although access to documents is presumed under the common law, the access right may be overcome by a showing that countervailing interests exist. This balancing of interests is "left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of a particular case."\(^{121}\)

The Supreme Court found that the common law guarantees a right of access to certain judicial documents in *Nixon v. Warner Communications*.\(^{122}\) In *Nixon*, the Court reviewed a request from the media to obtain copies of tapes containing conversations between defendants involved in the Watergate scandal.\(^{123}\) The tapes were played at a trial of one of the defendants and thus the public had access to them. The media, however, sought the right to copy the tapes and to sell them to the public.\(^{124}\) The Supreme Court first acknowledged that the tapes were judicial records and that the common law recognized a right of access to all judicial records.\(^{125}\) The Court then focused its analysis on the scope of that right of access to determine whether it included a right for

\(^{118}\) See *Nixon*, 435 U.S. at 589. The Court has never spoken of a common law right of access to trial, only to judicial records. See *id.* at 597-99.


\(^{120}\) Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

\(^{121}\) *Nixon*, 435 U.S. at 599.

\(^{122}\) *Id.* at 589.

\(^{123}\) *Id.* at 591.

\(^{124}\) *Id.*

\(^{125}\) The Court held that it was "clear" that this right exists. *Id.* at 597. Other courts have expanded on the purposes of the common law qualified right of access. See United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), rev'd on other grounds sub nom. *Nixon v. Warner Communications*, 435 U.S. 589 (1977) (holding that a common law right of access enlightens public opinion, safeguards justice, and promotes confidence in the judiciary).
media outlets to copy and distribute judicial records. The Court established the "sound discretion of the trial court" standard, where the presiding judge in any access case is to weigh all relevant interests to determine whether access to a particular judicial document is required.

Although the Nixon Court reasoned that only countervailing interests must be shown in order to overcome a presumption of access, some lower courts have applied stricter requirements. These courts have required a showing that the competing interests are compelling so that proper deference is granted to First Amendment concerns. The result is that these courts come very close to providing protection as if the common law right was of constitutional proportion. This expansion also coincided with what lower courts may perceive as greater access potential following the decisions in Press-Enterprise II and Richmond Newspapers. Thus, under Nixon, the common law guarantees a


127. The Court acknowledged that, in the past, courts granted access to judicial documents without a showing of special need or interest. Id. at 597-98. Presumably, courts also could apply this standard in the future. See William O. Key, Jr., Note, The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera, 16 GA. L. REV. 659, 660 (1982) (calling for Supreme Court guidance on scope of common law right of access); Teri G. Rasmussen, Note, Recognizing a Constitutional Right of Media Access to Evidentiary Recordings in Criminal Trials, 17 U. MICH. J.L. REV. 121, 123 (1983) (arguing for a right of access to documents introduced into evidence at trial); Stuart Wilder, Comment, All Courts Should Be Open: The Public’s Right to View Judicial Proceedings and Records, 52 TEMP. L.Q. 311, 337-39 (1979) (advocating increased public access to pretrial proceedings and judicial documents).

128. Nixon, 435 U.S. at 599. The Court avoided applying the standard to the particular facts involved in this case by disposing of the matter on different grounds. It held that the tapes were to be managed by an archives administrator who could determine which segments of the tapes were of historic value, and thus merited dissemination to the public. Id. at 603.


130. Seattle Times Co. v. Eberharter, 713 P.2d 710, 718 (Wash. 1986) (Andersen, J., concurring). The opinion argued that there should be a strong presumption of access to judicial records that would be entitled to significant weight in the access determination, so that “only the most compelling reasons can justify the nondisclosure of judicial records.” Id. The opinion relied on several circuit court of appeal holdings that granted a strong presumption of access to judicial records that had been introduced as evidence in trials. Id. (citing Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985); In re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983); United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982); In re Application of NBC (United States v. Criden), 648 F.2d 814, 823 (3d Cir. 1981); In re Application of NBC (United States v. Jenrette), 653 F.2d 609, 613 (D.C. Cir. 1981); In re Application of NBC (United States v. Meyers), 635 F.2d 945, 952 (2d Cir. 1980)).

131. In Baltimore Sun, the Fourth Circuit applied a balancing scheme similar to the strict scrutiny test the Supreme Court uses for a qualified First Amendment right of access to a common law qualified right of access. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989); see also In re Application of CBS, Inc., 828 F.2d 958, 960 (2d Cir. 1987) (granting a media petitioner permission to copy a videotaped deposition as the interests asserted for closure did not
qualified right of access to all judicial documents, which may include search warrants. However, the issue of whether the First Amendment guarantees a qualified right of access to documents has not been reached after Richmond Newspapers.

D. Search Warrants

Search warrants trace their roots to sixteenth-century England. During that time, the British monarchs began to use what was known as a “general warrant” to search the property of persons living within their realm. The initiation of these searches coincided with the invention of the printing press, and can be seen as a reaction to the use of the printing press and the fear of seditious or libelous publication. Over the years much public dissatisfaction brewed over the use of the general warrants. The warrants were seen as overbroad and oppressive. The history of search warrants also can be traced to colonial times in America. The British colonial rulers often used “writs of assistance” to search citizens’ belongings. These writs were issued by the English monarch and they lasted for a period of the issuing monarch’s lifetime plus six months. The writs were used primarily as a tool to detect smuggling. Customs officers were empowered to search any areas believed to be used for hiding smuggled goods. Like the general warrants used in England, the writs of assistance in America were detested because of their overbreadth. Customs officers were often issued blank writs to be filled in as they saw fit. This permitted the official to engage in searches with little or no justification.

Although both the British citizens living in England and the American colonists resented this governmental infringement on their property and belongings, their dissatisfaction was expressed in vastly different ways. While the English solved their problems through the courts, the Americans used the displeasure as a pretext for revolution.

rise to the level of “extraordinary” or “compelling circumstances”).

133. Id. at 24.
134. See infra text accompanying note 138 (noting that writs of assistance in America were detested because of their overbreadth).
135. Lasson, supra note 132, at 28.
139. Id.
140. Id.
The English ridded themselves of general warrants in the seminal case of *Entick v. Carrington.* John Entick, a searched individual, brought an action against the government for damages resulting from trespass. A general warrant had been issued by the King's secretary of state to search Entick's property and to seize papers allegedly containing seditious libel. The court upheld a judgment for Entick, finding that the government's incursion on Entick's property was unjustified. Lord Camden's opinion held that searches could be permitted only when the resulting invasion of private rights was outweighed "by some public law for the good of the whole." In this case the general warrant exceeded the balance between private rights and public necessity. Lord Camden further reasoned that since no established law permitted general warrants, their use was proscribed by the law of trespass. Eventually, the British Parliament abolished the use of the warrants.

The Americans found the writs of assistance a rallying point in their quest for independence. Much public discourse and debate occurred over the issue of warrants. The debate surrounding the warrants "was the first act of opposition to the arbitrary claims of Great Britain," and from it, "the child Independence was born." After the American Revolution, several states incorporated a warrants clause into their state constitutions. These clauses were the precursors to the Fourth Amendment to the United States Constitution.

While the history of search warrants themselves is discernable, the history of public access to review the warrants is much murkier. Clearly, the Fourth Amendment does not explicitly call for a right of access to search warrants.

141. 95 Eng. Rep. 807 (C.P. 1765).
144. Id. at 817-18.
145. Id.
146. Id. at 817.
147. Id.
149. The most famous debate on the legitimacy of writs of assistance took place in Boston in 1760 between James Otis and Jeremiah Gridley. This debate followed the death of King George II. Because of his death, all writs expired six months later. Thus, the debate centered on whether the writs should be reissued.
150. 10 *WORKS OF JOHN ADAMS* 247-48 (1850).
152. The Fourth Amendment to the United States Constitution states:
However, the purpose of the amendment is to protect the public from the government's overaggressive use of power. The amendment imposes strict requirements for the issuance of a warrant in order to insure public protection from this evil. Some sort of public oversight must have been contemplated in order to insure that this alleged protection actually was being carried out.  

The search warrant procedure in American courts starts with the government's application to a magistrate or judge for the warrant. Applications generally consist of affidavits supporting the claim of probable cause and an oath by the applicant authenticating the application.  

The search warrant will be issued if there is probable cause to believe that the legitimate object of the search is at a particular location, and if the oath and affidavits themselves are in order. After issuance, the law enforcement authorities must conduct the search within a statutorily prescribed time limit. The warrant then must be returned to the issuing judge and filed with the court.

The government has the ability to request that the executed search warrants be filed under seal. Generally, courts freely grant sealing orders for search warrants upon a showing by the government that it requires secrecy. The government is permitted to make its own determinations on whether an investigation requires secrecy and thus needs sealing orders. Generally, courts are highly deferential to the governmental determination of the need for closure.

E. Public Access to Sealed Search Warrants

When courts examine access requests concerning sealed search warrants...
they can take one of two approaches for determining whether a right of access to the documents exists. They can look at the search warrants as judicial records, thereby applying the *Nixon* common law qualified right of access to them, and possibly even applying a First Amendment right of access.161 Alternatively, courts can evaluate the request of access to a search warrant as a request of access to a judicial proceeding that may have generated the warrant or to which the warrant is integrally related.162 This latter approach would be consistent with the method used by the Supreme Court in some access cases.163

Search warrant access cases are also unique in that they pit very divergent interests against one another. Thus, in any warrant access case the reviewing court must balance the rights and concerns of the public, the government, and the searched individual.

1. Interests that Are Asserted

Although either the common law or the First Amendment may allow a right of access to a judicial proceeding or document, that right is only a qualified right.164 The qualified right of access must be balanced against the various interests that may weigh against disclosure. In the various cases analyzing the qualified right of access to search warrants, courts have weighed the advantages of public access against the harms of disclosure that may befall government and individuals.

a. The government's interests

In almost every case involving access to search warrants, the government has an interest in ensuring that law enforcement will not be thwarted.165 The government has an interest in the success of an ongoing investigation in which the disputed search warrants and affidavits are used. Although the search warrant and affidavit may play only a small role in the investigation, they nevertheless could divulge much information. According to the government, access to such documents could taint the investigation because the dissemination of the information contained in the warrants or the affidavits could reveal the scope and direction of the government's plans.166 The sought-after documents

---

161. Recall that the Court has not ruled on the First Amendment right of access to judicial records since the *Richmond Newspapers* decision guaranteed a qualified right of access, under the First Amendment, to judicial proceedings. See supra notes 58-78 (discussing the *Richmond Newspapers* decision at length).

162. The courts in the search warrant access cases have employed the latter method, examining search warrant access requests pursuant to access rulings on warrant proceedings, grand jury proceedings, and suppression hearings. See infra notes 214, 230, 236 and accompanying text.


165. An interest in law enforcement may, of course, be an interest of the public also.

166. See In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 574
may also contain information that would motivate suspects to destroy evidence, to tamper with witnesses by coordinating testimony, to endanger the government's informants, to threaten or intimidate reluctant witnesses, or to flee the jurisdiction.

b. The individual's interests

Individuals who are the focus of search warrants also have many interests. The primary interest is privacy, an interest that has faced the Supreme Court on more than one occasion in judicial proceeding access cases. Public access to sealed search warrants would let the public know that these individuals were the focus of a governmental investigation. Likewise, although the individuals remain uncharged, the public might perceive the government's suspicion as guilt on the part of the suspect. Disclosure thus could seriously damage the reputations and careers of suspects and place them in a "precarious position as un-indicted co-conspirators." Additionally, since these persons are private individuals, they may not have any forum in which to exonerate themselves from the smear of government suspicion.

Courts take differing approaches to weighing the importance of reputation and privacy interests. Some courts hold that judicial documents can be sealed if they imply that a person engaged in criminal misconduct. Other courts

(8th Cir. 1989).

167. Times Mirror Co. v. United States, 873 F.2d 1210, 1215 (9th Cir. 1989).
168. Id.
169. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989).
170. Times Mirror, 873 F.2d at 1215.
171. Id.

172. In *Press-Enterprise I*, the Court voiced concern over the privacy interest of the jurors during voir dire. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512 (1984). In *Gannett* the Court was concerned with the privacy interest of minors. See *Gannett Co. v. DePasquale*, 443 U.S. 369 (1979). In earlier cases the Court has held that individuals have a privacy interest when they are subjects of governmental investigations. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) (denying access to grand jury transcripts); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.2 (1958) (denying access to a grand jury transcript for failure to "show cause" for disclosure). However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court ruled that a rape victim's privacy interest in keeping her name out of the papers did not outweigh the presumption of openness when the names of rape victims were printed on public judicial documents. *Id.* at 496-97.

173. Times Mirror, 873 F.2d at 1216.
175. Times Mirror, 873 F.2d at 1216.
176. See *Pulitzer Publishing*, 895 F.2d at 464 (sealing search warrant affidavits that implied criminal misconduct by an unindicted individual); *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (denying access to portion of bill of particulars containing names of unindicted individuals because "it is virtually certain" that disclosure will inflict "serious injury" to the persons, possibly threatening their careers); *In re NBC*, 653 F.2d 609, 619 (D.C. Cir. 1981) (preventing petitioner from copying videotapes introduced into evidence containing references to objecting third parties if those references expose the objecting individual to public humiliation and
have required only that information causing "intensified pain" to an individual be suppressed.177 These courts have held that a person has not suffered intensified pain even if the information in the documents is false or links the individual to criminal activities.178 Intensified pain is suffered only when the statements or information disclosed is libelous or involves intimate conversation.179

The Supreme Court itself has addressed a privacy interest with respect to court access in various ways. In Gannett and Press-Enterprise I, the Court held that the respective privacy concerns of minors and jurors could be compelling interests if the information disclosed by a judicial process embarrassed the individual or caused emotional trauma.180 But the Court has also discounted privacy interests in other cases, such as when an embarrassing or traumatizing fact is part of an official judicial record.181

Since the search warrant access cases involved warrants executed on corporations as well as on individuals, either of these groups may claim privacy interests. However, a corporation's privacy interest may be weaker than that of a private individual. This is also true for individuals in their capacity as employees of the searched corporations.182 Courts are less willing to protect corporate privacy or reputation interests, especially if the corporation has engaged in potentially illegal activities.183 Moreover, corporations relying on government contracts may have even less of a privacy interest.184 A corporation's

degradation).

177. See United States v. Criden, 681 F.2d 919, 922 (3d Cir. 1982) (requiring that references to innocent third parties in judicial documents must "inflict unnecessary and intensified pain" in order to be suppressed, and that unflattering and even false references or speculation on impact of negative publicity do not rise to the level of "intensified pain"); In re News World Comm., Inc., [1989] 17 Media L. Rep. (BNA) 1001, 1003 (D.D.C. Oct. 5, 12, 1989) (holding that an individual accused of being related in some way to a criminal investigation or exposed for having difficulties at the workplace did not suffer injury to reputation or privacy interest that rose to level of "intensified pain," but the requirement could be met with a showing of libelous statements or recordings of bedroom or other intimate conversation).


182. See infra notes 183-85 (explaining judicial treatment of the privacy interests of corporations and of corporate employees in their representative capacity).

183. See Wilson v. American Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985) (holding that a company's reputation interest does not overcome the common law presumption of access to judicial records (settlement documents)); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179-80 (6th Cir. 1983) (stating that corporations cannot shield mismanagement because of harm to their reputations); Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) (reversing a sealing order of pretrial records since the records did not contain information on trade secrets but rather contained evidence of corporate mismanagement and potentially illegal conduct), cert. denied, 460 U.S. 1051 (1983).

employees may also have less of a reputation or privacy interest if the warrant relates to actions taken on behalf of their corporation.\textsuperscript{186}

c. The public's interest

The public's interest in access to courtrooms relates back to the underpinnings of the First Amendment, where it is argued that access can help facilitate self-government.\textsuperscript{186} Access leads to unfettered, robust debate\textsuperscript{187} and helps to determine how we vote.\textsuperscript{188} In the search warrant access cases in particular the public may have had a self-governing interest in that the search warrants were sealed in furtherance of massive FBI investigations of the defense weapons industry and the health care industry.\textsuperscript{189} Since public funds financed the government's investigation and made up a large share of the money flowing into the defense and health care industries, the public may have had an interest in seeing what came of its tax dollars.\textsuperscript{189}

Additionally, access serves as a check on the judiciary and the prosecution. This was a major point of Justice Blackmun's dissent in \textit{Gannett} where he wrote:

\begin{quote}
[Our nation's] accepted practice of providing open trials in both federal and state courts has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.\textsuperscript{191}
\end{quote}

\textsuperscript{185} In other contexts, employees forego certain rights if those rights must be asserted in conjunction with their roles as employees. \textit{See In re Grand Jury Proceedings}, 771 F.2d 143 (6th Cir. 1985) (holding that employees of a corporation cannot claim a Fifth Amendment right against self-incrimination when asked to produce documents belonging to the corporation). \textit{Contra In re Grand Jury Matter}, 768 F.2d 525 (3d Cir. 1985) (holding that the custodian of records for a corporation cannot be compelled to authenticate the records if he or she invokes the Fifth Amendment privilege against self-incrimination).

\textsuperscript{186} \textit{See supra} notes 22-27 and accompanying text (discussing the work of Alexander Meiklejohn, who supports this position).


\textsuperscript{188} Cowles Publishing Co. v. Murphy, 637 P.2d 966, 969 (Wash. 1981).

\textsuperscript{189} Times Mirror Co. v. United States, 873 F.2d 1210, 1215 (9th Cir. 1989).

\textsuperscript{190} \textit{See In re Petroleum Product Litig.}, 101 F.R.D. 34 (C.D. Cal. 1984). In this case, the attorneys general of several states sued a group of oil companies, accusing them of driving independent gasoline dealers out of business. The court held that the public deserved access to pretrial documents since millions of dollars were affected if the charges of fraud were true, and if the charges were false the public deserved to hear about the money wasted on the intense investigation. \textit{Id.} at 39; \textit{see also} Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (holding that the interest of citizens in penal administration can be outweighed only by a compelling governmental interest).

\textsuperscript{191} \textit{Gannett} Co. v. DePasquale, 443 U.S. 368, 412 (1979) (Blackmun, J., dissenting) (quoting \textit{In re Oliver}, 333 U.S. 257, 270 (1948)). Justice Blackmun also relied heavily on the writings of Jeremy Bentham, who believed that publicity was "the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes." \textit{Id.} at 422 (Blackmun, J., dissenting) (citing \textit{JEREMY BENTHAM,}}
Court access cases have explored numerous other reasons why general access is necessary. Among the recognized interests is that of the public in receiving accurate information on the criminal justice system and in having the appearance of justice, which in turn would create a significant therapeutic value to citizens. Access to courts can also have a positive educational effect on the public: "[N]ot only is the respect for the law increased and intelligent acquaintance acquired with the methods of government but a strong confidence in judicial remedies is secure which could never be inspired by a system of secrecy."

While the public may have an abstract interest in free speech and its effects on democratic government, the public also has an interest in effective governmental law enforcement. Additionally, the public does not necessarily want the press to abuse access rights by using the information they receive to "gratify spite and promote public scandal."

2. Search Warrant Access

The federal circuit courts that have recently reviewed requests for access to sealed search warrants have decided whether a qualified right of access to search warrants is grounded in the First Amendment or the common law. The courts have approached these two access issues in various ways. The Eighth Circuit has held that there exists both a common law and First Amendment

A TREATISE ON JUDICIAL EVIDENCE 67 (1825). This interest of a check on the judiciary and the prosecution was a rationale for a qualified right of access to search warrants in In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988). This interest also was asserted by the Nixon Court as justifying deference towards access to judicial documents. Nixon v. Warner Communications, 435 U.S. 589, 597 (1978).

192. Gannett, 443 U.S. at 412.

193. Richmond Newspapers v. Virginia, 448 U.S. 555, 570-71 (1978). The Court noted: The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results. When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help" as indeed they did regularly in the activities of vigilante "committees" on our frontiers.

Id.

194. Id. at 572 (citing 6 JOHN H. WIGMORE, EVIDENCE § 1834, at 438 (James H. Chadbourn ed., 1976)).

195. See Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989).

right of access to search warrants.\textsuperscript{197} Alternatively, the Ninth Circuit has expressly disagreed with the Eighth Circuit, holding that no First Amendment or common law right of access to search warrants exists.\textsuperscript{198} Finally, the Fourth Circuit has reached a middle ground between the other two courts, holding that the common law grants a right of access, but that the First Amendment does not.\textsuperscript{199} The three federal circuits are in accord with how to treat the search warrants with respect to the Nixon judicial-document access cases.

After search warrants are executed and filed with the issuing court they become judicial documents.\textsuperscript{200} However, none of the courts has analyzed the warrants as independent judicial documents, consistent with the Nixon line of cases. Instead, the courts have examined warrants as integrated parts of the proceedings that they relate to, following the method of analysis employed in the earlier media access cases.\textsuperscript{201} The Eighth Circuit has established the right of access by examining the history of access to suppression hearings.\textsuperscript{202} Conversely, both the Ninth and Fourth Circuits have rejected the examination of suppression hearing access and instead look to the history of access to warrant proceedings.\textsuperscript{203}

a. The First Amendment approach

Media petitioners have asserted a First Amendment right of access to search warrants that would force the government to prove a compelling interest justifying closure. However, the argument for First Amendment access has been denied by several courts.

The first major case on access to sealed search warrants in the federal circuit courts was \textit{In re Search Warrant for Secretarial Area Outside Office of Gunn}.\textsuperscript{204} In \textit{In re Gunn}, an Eighth Circuit case, the Federal Bureau of Investigation ("FBI") was conducting an ongoing investigation of corruption and fraud in the Defense Department and the defense weapons industry (Operation Ill Wind).\textsuperscript{205} During the course of the nationwide investigation, the FBI applied for, and received, search warrants from the Eastern District of Mis-

\begin{itemize}
\item \textsuperscript{197} \textit{In re Search Warrant for Secretarial Area Outside Office of Gunn}, 855 F.2d 569, 571 (8th Cir. 1988).
\item \textsuperscript{198} See \textit{Times Mirror}, 873 F.2d at 1217.
\item \textsuperscript{199} See Baltimore Sun Co. v. Goetz, 886 F.2d 60, 63-64 (4th Cir. 1989).
\item \textsuperscript{200} Id.
\item \textsuperscript{201} See supra note 117 (discussing \textit{Press-Enterprise I} and \textit{Press-Enterprise II}).
\item \textsuperscript{202} \textit{In re Search Warrant for Secretarial Area Outside Office of Gunn}, 855 F.2d 569, 573 (8th Cir. 1988). "Pre-trial suppression hearings, and other kinds of non-trial proceedings in criminal and civil cases, have been held to be subject to the First Amendment right of public access. . . ." Id.
\item \textsuperscript{203} See, e.g., \textit{Baltimore Sun}, 886 F.2d at 63-64; \textit{Times Mirror Co. v. United States}, 873 F.2d 1210, 1215-16 (9th Cir. 1989).
\item \textsuperscript{204} 855 F.2d 569 (8th Cir. 1988).
\item \textsuperscript{205} Id. at 570. For other commentary on Operation Ill Wind and the resulting adjudication, see Jeffrey L. Levy, Note, \textit{An Ill Wind Blows: Restricting the Public's Right to Search Warrant Affidavits}, 74 MINN. L. REV. 661 (1990).
\end{itemize}
souri to search the offices of the McDonnel Douglass Corporation. In applying for these search warrants, the FBI had attached affidavits and other exhibits to establish probable cause. The search warrants were executed and returned to the district court, where they were placed under seal pursuant to the government’s request. Appellant, Pulitzer Publishing Company, sought access to the search warrants and the accompanying information. At the time that appellant sought the information, Operation Ill Wind was ongoing and the government had not yet indicted anyone. The district court ruled that the documents were to remain sealed for at least thirty days and an expedited appeal took place.

The Eighth Circuit found both a First Amendment qualified right of access and a common law qualified right of access to the documents. The three judges on the panel issued separate opinions. Judge McMillian, in finding a First Amendment qualified right of access, applied the two-pronged Press-Enterprise II standard, where a First Amendment qualified right of access exists if there is a history of access and the access will contribute to the government process. He found that an historical basis for public access to search warrants exists since suppression hearings—a judicial function to which the warrants are integral—are considered accessible. Judge McMillian also found a contribution to the function of the process since access would increase the public’s understanding of the search warrant process and may curb prosecutorial and judicial misconduct. Because a qualified First Amendment right of access existed, Judge McMillian proceeded to weigh the competing interests to access to determine whether the presumption of access to the warrants could be overcome. He ultimately denied access to the media because the government had satisfied the requirements of strict scrutiny. Judge McMillian held that the government had an important interest in ensuring the success of

---

206. In re Gunn, 855 F.2d at 570.
207. Id. at 571.
208. Id.
209. Id.
210. Id.
211. Id.
212. Id. at 573.
213. Id. The precedential value of Judge McMillian’s opinion is unclear. Judge McMillian and Judge Bowman reached the same conclusion—that there was no right of access to the search warrants. However, Judge McMillian, unlike Judge Bowman, considered the possibility of a qualified First Amendment right of access.
214. Id. The court recited the history of suppression hearings, since the warrants are the center of those hearings at a later stage. The judge did not indicate why this approach was preferable to examining the history of the warrants themselves. See id.
215. Id.
216. Id. at 574. Once a First Amendment qualified right of access exists, a presumption of access to a particular process can be overcome only by a showing of compelling interests, narrowly tailored to serve those interests. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984).
217. In re Gunn, 855 F.2d at 574. The strict scrutiny test would permit closure if it “is essential to preserve higher values and is narrowly tailored to that interest.” Id.
the ongoing investigation and that there was no less restrictive means to deal with the access request because every line of the affidavit was crucial.\textsuperscript{216}

Judge Bowman, writing separately, declined to join Judge McMillian in recognizing a qualified right of access under the First Amendment, leaving "the First Amendment question to another day."\textsuperscript{219} Judge Bowman stated that even if, hypothetically, the First Amendment right existed, access would still be denied since the government justification for sealing was "abundantly clear."\textsuperscript{220} The government had a strong interest in not compromising its investigation of the alleged criminal activities.\textsuperscript{221}

Judge Heaney, also writing separately, agreed with Judge McMillian that both a First Amendment and common law right of access to the documents existed. Judge Heaney adopted Judge McMillian's reasoning on the First Amendment issue that access was mandated both historically and functionally.\textsuperscript{222} After determining that this right of access existed, Judge Heaney disagreed with Judges McMillian and Bowman on the disposition of the case. Judge Heaney argued that the government had not shown a compelling interest to overcome the presumption of access.\textsuperscript{223} Judge Heaney maintained that since the investigation was drawing to a close and because extensive media coverage of the investigation had already taken place, any targets of the probe must be cognizant of the investigation, and thus the government's interest in law enforcement was minimal.\textsuperscript{224} Further, he reasoned that since this alleged fraud involved hundreds of millions of taxpayer dollars, the public was "entitled to know the full details of the procurement fraud as soon as possible in order to intelligently act on the matter."\textsuperscript{225}

The next major case on search warrant access also stemmed from Operation Ill Wind. The Ninth Circuit, in \textit{Times Mirror Co. v. United States},\textsuperscript{226} dealt with a media outlet's request to unseal certain search warrants and accompanying affidavits that the government had sealed after the search of an arms contractor's facility.\textsuperscript{227} The Ninth Circuit disagreed with the Eighth Circuit and found no First Amendment right of access to search warrants.\textsuperscript{228} The court in \textit{Times Mirror} also applied the \textit{Press-Enterprise II} test but reached

\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 576 (Bowman, J., concurring). Judge Bowman argued that even if he were to find that the petitioners had a First Amendment qualified right of access to the warrants, the closure order would still stand because the government had a compelling interest that outweighed the qualified right of access. He would only determine whether the First Amendment right of access existed if the petitioners had a reasonable chance of gaining disclosure. \textit{Id.} (Bowman, J., concurring).
\textsuperscript{220} \textit{Id.} at 575 (Bowman, J., concurring).
\textsuperscript{221} \textit{Id.} (Bowman, J., concurring).
\textsuperscript{222} \textit{Id.} at 576 (Heaney, J., concurring in part and dissenting in part).
\textsuperscript{223} \textit{Id.} (Heaney, J., concurring in part and dissenting in part).
\textsuperscript{224} \textit{Id.} (Heaney, J., concurring in part and dissenting in part).
\textsuperscript{225} \textit{Id.} (Heaney, J., concurring in part and dissenting in part).
\textsuperscript{226} 873 F.2d 1210 (9th Cir. 1989).
\textsuperscript{227} \textit{Id.} at 1211-12.
\textsuperscript{228} \textit{Id.} at 1217.
the opposite conclusion; the court determined that there was no tradition of access to search warrants or to warrant proceedings and that access would provide no positive contribution to the process. In examining the traditions of access and in subsequently finding that no tradition of access existed here, the court's approach differed from that of the In re Gunn court because it treated the request for the search warrants as a request to access warrant issuing proceedings. Thus, the court traced the historical roots of access to warrant proceedings rather than suppression hearings or search warrants themselves. The court did not explain why it was examining the history of warrant proceedings rather than the historical basis of access to suppression hearings or to the search warrants themselves, or why that approach was dispositive of the right of access to the warrants. The court's finding that public access conferred no positive contribution to the warrant process turned on the pronouncement that access would impede government investigations and would violate the privacy interest of an individual who had not been charged with any crime.

The Fourth Circuit joined the debate in 1989 in Baltimore Sun Co. v. Goetz. In Baltimore Sun, the court reviewed a district court ruling that had sealed search warrants and affidavits from an FBI investigation of fraud and organized crime in the health insurance industry. The Baltimore Sun court applied the Press-Enterprise II test and also treated the access request to the search warrants as an access request to a warrant issuing proceeding, similar to the method used by the Times Mirror court. Thus it examined the historical basis for access to warrant proceedings, ignoring the traditions of access to suppression hearings or to the warrants themselves. The court determined that no First Amendment right of access to the warrants existed since warrant proceedings had traditionally been closed to the public. Because the court

229. Id. at 1215-16.
230. Id. at 1215.
231. Id.
232. Id. at 1216. The court stated that reports linking an individual to a governmental investigation of criminal activities would cause serious injury to that person. Id. The court also found that the government probe must remain secret so that the targets of the probe will not be tipped off. Id. at 1215.
233. 886 F.2d 60 (4th Cir. 1989)
234. Id. at 62.
235. Id. at 63-64.
236. Id. The Times Mirror court also examined the history of access to warrant proceedings rather than to suppression hearings or the warrants themselves, also failing to give a reason for its choice of jurisprudence regarding that particular hearing as being dispositive of access decisions regarding the warrants themselves. Times Mirror, 873 F.2d at 1218. For a general discussion of the court's analysis in Times Mirror, see supra notes 226-32 and accompanying text.
237. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989). In ruling that warrant proceedings are closed to the public, the Baltimore Sun court relied on Franks v. Delaware, 438 U.S. 154, 169 (1978) and United States v. United States Dist. Court, 407 U.S. 297, 321 (1972), where the Supreme Court had ruled that warrant issuing proceedings were not public proceedings because access could tip off individuals who were the focus of potential searches. Baltimore Sun, 886 F.2d at 64.
found the First Amendment right of access lacking, it did not have to balance the various interests involved. The court did note, however, that governmental law enforcement interests were compelling at the warrant proceeding stage.\textsuperscript{238}

The most recent case on search warrant affidavits is the 1990 opinion from the Eighth Circuit in \textit{Certain Interested Individuals v. Pulitzer Publishing Co.}\textsuperscript{239} The case was a remnant of \textit{In re Gunn} with the same cast of characters as before.\textsuperscript{240} However, at the point at which this case arose, the government had withdrawn its assertion of an interest in keeping the search warrant information sealed and only the searched individuals sought to seal the documents.\textsuperscript{241} Here, the court reiterated the First Amendment and common law rights of access that it had recognized in \textit{In re Gunn}, and then sought to balance that presumption of access versus competing interests.\textsuperscript{242} Balancing the public's right of access against only the individual's privacy interest, the court still found the individual's privacy interest compelling enough to overcome the presumption of access.\textsuperscript{243} The court specifically held that an unproven implication that an individual was involved in criminal activity is damaging enough to a person's reputation to constitute a compelling interest justifying closure over a qualified First Amendment right of access.\textsuperscript{244}

b. Common law approach

In three of the four search warrant access cases addressed, the courts also engaged in discussion concerning a common law right of access to search warrants as judicial documents pursuant to \textit{Nixon v. Warner Communications.}\textsuperscript{245} The courts also reached various conclusions concerning this right of access.

In \textit{In re Search Warrant for Secretarial Area Outside Office of Gunn,}\textsuperscript{246} where a three judge panel of the Eighth Circuit reviewed access requests to sealed search warrants from an arms procurement fraud investigation, all three judges had different approaches to the common law access issue. Judge McMillian failed to reach the common law issue since he found that the First Amendment guaranteed a qualified right of access. Presumably, he felt that the First Amendment right of access was stronger, making it unnecessary to go further. Judges Bowman and Heaney did find a qualified common law right of access, but their interpretation of the strength of this right varied immensely. Judge Bowman found that the common law qualified right of access to documents was "well established."\textsuperscript{247} The decision of whether access in a

\textsuperscript{238} \textit{Baltimore Sun}, 886 F.2d at 64.
\textsuperscript{239} 895 F.2d 460 (8th Cir.), \textit{cert. denied}, 111 S. Ct. 214 (1990).
\textsuperscript{240} \textit{Id.} at 463.
\textsuperscript{241} \textit{Id}.
\textsuperscript{242} \textit{Id.} at 462, 466.
\textsuperscript{243} \textit{Id.} at 466.
\textsuperscript{244} \textit{Id}.
\textsuperscript{246} 855 F.2d 569 (8th Cir. 1989).
\textsuperscript{247} \textit{Id.} at 576 (Bowman, J., concurring) (citing \textit{Nixon v. Warner Communications}, 435 U.S.
particular case should be granted, however, should be done by a balancing of interests, left to the sound discretion of the trial judge. Alternatively, Judge Heaney argued that the common law right of access should be as strong as a First Amendment right of access, so that access could be denied only with a showing of a compelling governmental interest that is narrowly tailored to serve that interest. Judge Heaney disagreed with Judge Bowman's interpretation that all interests should be balanced evenly. Judge Heaney would grant much greater deference to public access concerns.

In *Times Mirror*, another arms procurement fraud case, the Ninth Circuit, after rejecting a First Amendment right of access, also rejected a common law right of access to the search warrants. The court argued that the common law right of access delineated in *Nixon* was an "alleged" right of access. The court preferred to rely on other Ninth Circuit precedent holding that the *Nixon* qualified right of access did not extend to all documents. Thus, when applying the Ninth Circuit version of *Nixon*, the court required that parties seeking access to judicial documents prove "a history of access" to the document, and "an important public need justifying access." Under the Ninth Circuit formulation, the burden was on the petitioner to prove a common law right of access to judicial records. This contrasts with both frameworks set out by the divided court in *In re Gunn*, where a presumptive common law right of access existed, and the party opposing access had to prove either compelling or outweighing interests to justify closure. In *Times Mirror*, the media petitioners failed to prove a tradition of access to search warrants, as warrant issuing proceedings have traditionally been closed to the public. The parties seeking access also failed to show an important public need for access because access would hinder governmental law-enforcement efforts. Thus, the common law


248. Id. (Bowman, J., concurring).

249. Id. at 576 (Heaney, J., concurring in part and dissenting in part). Judge Heaney would have applied the strict scrutiny standard of *Press-Enterprize II* to a common-law qualified right of access. Id. (Heaney, J., concurring in part and dissenting in part).

250. Judges Bowman and McMillian held that the governmental interests outweighed the First Amendment interests, thus ultimately denying access. Judge Heaney would have permitted access under his version of the balancing test. Id. (Heaney, J., concurring in part and dissenting in part).

251. Times Mirror Co. v. United States, 873 F.2d 1210, 1218 (9th Cir. 1989).

252. The *Times Mirror* court cited *In re Special Grand Jury*, 674 F.2d 778 (9th Cir. 1982), which "established one limitation on the common law right of access described in *Nixon* v. *Warner Communications*—there is no right of access to documents which have traditionally been kept secret for important policy reasons." *Times Mirror*, 873 F.2d at 1219. In *In re Special Grand Jury*, the court had denied a common law right of access to grand jury documents. 674 F.2d at 781.

The *Times Mirror* court also cited *Associated Press v. United States* Dist. Court, 705 F.2d 1143 (9th Cir. 1983). The court read *Associated Press* to hold that *Nixon* was to be interpreted as not extending access to "all pretrial documents." *Times Mirror*, 873 F.2d at 1219.

253. *Times Mirror*, 873 F.2d at 1219.

254. Id. at 1215-16.

255. Id. at 1219 ("While we went on to hold that the public had a first amendment right of access to most pretrial proceedings and documents, we did not suggest that the common law right
right of access was rejected.

The *Baltimore Sun* court split on the access issues. The Fourth Circuit rejected a First Amendment right of access, but it did find a common law right of access. The court relied on *Nixon*, which it understood to guarantee a common law right of access to *all* judicial documents. This reading of *Nixon* contrasts with the *Times Mirror* interpretation, where it was held that the *Nixon* right of access was limited only to certain documents that have historically been accessible and whose access benefits the public. The *Baltimore Sun* court found that search warrants are judicial documents as defined by Federal Rule of Criminal Procedure 41(g) and found, therefore, that *Nixon* grants the public a qualified right of access to them. It applied the *Nixon* principle that determination of access pursuant to a qualified common law right of access to judicial documents is left to the "sound discretion" of the judge. The court held that when judges exercise their discretion, they should grant a high presumption of access, denying access only when sealing is "essential to preserve higher values and is narrowly tailored to serve that interest." The *Baltimore Sun* approach to the evaluation of the divergent interests is identical to the test proposed by Judge Heaney in his opinion in *In re Gunn*. Judge Heaney also called for a common law right of access that would be analyzed under a strict scrutiny test. The *Baltimore Sun* court then vacated the district court's approval of the sealing order, holding that the findings that the affidavits and warrants should be sealed were not specific enough.

A review of the methods various circuits have implemented in assessing search warrant access questions reveals that three distinct approaches exist. First, the Eighth Circuit in *In re Gunn* and in *Certain Interested Individuals of access extended to all pretrial documents.

---

257. Id.
258. *Times Mirror*, 873 F.2d at 1219.
259. *Baltimore Sun*, 886 F.2d at 65. Search warrants are routinely filed with the clerk of the court pursuant to Rule 41(g), and are therefore considered judicial documents. After filing, they are available for use in the subsequent trial if their "sufficiency is questioned." *Id.* at 64; see supra note 114 (setting forth the text of Rule 41(g)).
260. *Baltimore Sun*, 886 F.2d at 64.
261. *Id.* at 65-66 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). Thus, the *Baltimore Sun* court applied the presumption of access that exists for the First Amendment qualified right of access to a common law right of access, thereby making the two rights indistinguishable. The court may have been influenced by the perception that accessibility should increase after the Richmond Newspapers line of cases was decided. See supra note 116 and accompanying text.
263. *Id.* (Heaney, J., concurring in part and dissenting in part).
264. *Baltimore Sun*, 886 F.2d at 66. The district court had concluded that the search warrant should be sealed because the public interest in having successful FBI investigations outweighed the public's interest in access. However, this ruling was based on conclusory assertions and the appellate court required specific findings of the public's interest in law enforcement. *Id.*
found a First Amendment qualified right of access as well as a common law right of access. Alternatively, the Ninth Circuit in *Times Mirror* rejected both of these approaches and held that no right of access exists. Finally, the Fourth Circuit in *Baltimore Sun* apparently reached a middle ground since it denied a First Amendment right of access, but found that right assured under the common law. However, the Fourth Circuit's approach was similar to the Eighth Circuit's analysis since both courts required that any interest competing against the qualified right of access be compelling and narrowly tailored to serve that interest. Once the courts found a qualified right of access, they engaged in a balancing analysis when privacy interests and law enforcement interests were found to be compelling.

II. ANALYSIS

Courts evaluating challenges to sealing orders preventing access to search warrants must take two steps in their review. First, the courts must determine whether a qualified First Amendment or common law right of access exists. Second, if a qualified right of access is found, the court must balance that right against other competing interests such as the government's interest in law enforcement or an individual's interest in privacy.

In this section, the Comment will recommend how courts should implement the two steps used in access review. As applied now, both steps are inadequate. The two-pronged *Press-Enterprise II* standard, the current methodology employed by the circuit courts for determining whether access rights exist, is inadequate because it overemphasizes the role of history in search warrant access questions. The overemphasis on historical standards of access precludes the access potential that is consistent with modern expectations. Secondly, the balancing-of-interests standards used by courts that have found a qualified right of access are inadequate because they overemphasize the importance of governmental and individual interests at the cost of society's greater interest in openness.

A. Methodology: Finding a Suitable Test for Determining Access Rights to Search Warrant Materials—The *Press-Enterprise II* Test is Inappropriate

The methodology used by the search warrant access courts for determining whether a right of access to search warrants exists is an application of the *Press Enterprise II* test. The test, however, is inappropriate for determining access to judicial documents such as search warrants that are not integrally related to particular judicial processes. The test is also flawed in that it places an inordinate amount of emphasis on historical traditions, rather than the realities of modern life. A balancing scheme is the best method for determining whether the public deserves access to sealed search warrants.
1. Focus on Search Warrants

The courts in the search warrant access cases examined the public's right of access to search warrants under the PressEnterprise II standard. Under that standard, the historical basis of the proceeding and the contribution to the function are weighed in a complementary fashion. When applying the "traditions of access" prong to the disputed warrants, the courts sought to examine the traditions of access to judicial proceedings that were related to the search warrants, rather than examining the traditions of access to the search warrants themselves. The courts chose to determine accessibility to warrants by examining a proceeding integral to the warrant. In doing so, they had to first decide which proceeding was, in fact, most integral to the warrants. The courts, however, had different interpretations of which hearings the post-execution, pre-indictment search warrants best related to. Consequently, in an effort to determine whether the public has a right of access to these search warrants, the courts explored the history of access to suppression hearings (where determinations of admissibility of evidence obtained through warrants take place), warrant proceedings (where warrants are issued by magistrates or judges), and grand jury sessions (where information obtained by a warrant may be introduced to obtain an indictment). Clearly, confusion exists as to which judicial proceeding a post-execution, pre-indictment search warrant best relates. This disorder underlies the fact that there is no proceeding to which the warrants should be considered integral, and therefore the warrants should be examined as separate judicial documents.

Both the Baltimore Sun and the Times Mirror courts held that, since the search warrants were issued originally from warrant proceedings, any access requests to warrants should be treated as an access request to warrant proceedings. However, the finding of a correlation between the warrants and the warrant proceeding is faulty since there is a fundamental difference between search warrants at the warrant proceeding stage and search warrants at the post-execution stage. At the warrant proceeding, the state's interest in secrecy is much more significant since at that point the individual to be searched

266. See In re Gunn, 855 F.2d 569 (examining history of access to suppression hearings); Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) (examining history of access to warrant proceedings); Baltimore Sun, 886 F.2d 60 (same).

The courts apparently decided to follow the Supreme Court's approach. See Press-Enterprise II, 478 U.S. at 10-13 (finding a right to a preliminary hearing transcript by examining the history of access to the proceedings); Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 513 (1984) (finding a right of access to a voir dire proceeding transcript based on a tradition of access to the hearing itself); see also supra note 117 (discussing Press-Enterprise I and Press-Enterprise II).
267. In re Gunn, 855 F.2d at 573.
268. Baltimore Sun, 886 F.2d at 64; Times Mirror, 873 F.2d at 1214.
269. Times Mirror, 873 F.2d at 1214.
270. See supra note 236 and accompanying text.
could be tipped off, and the privacy interest of the individual is greater since not even a probable cause standard of suspicion has been met by the government prior to the warrant proceeding. It is logical that public access to warrant issuance proceedings would be disadvantageous. However, in the search warrant access cases, the public sought access to the warrants after they were already executed. Thus, the disadvantages present at the warrant issuance proceeding stage no longer existed.

The Eighth Circuit in *In re Gunn* and *Certain Interested Individuals* also failed to examine a tradition of access to search warrants themselves, but inspected the traditions of access to suppression hearings when finding a qualified right of access. The finding of a relationship between the search warrants themselves and the suppression hearing is also faulty as differences exist in warrants at the post-execution, pre-indictment stage and the suppression stage of a trial. At the suppression stage, the person has already been indicted and thus has lost some privacy interests, and the government's investigation is already over for all intents and purposes so that their interest in closure is diminished. Therefore, analyzing rights of access to suppression hearings provides too much potential access to a search warrant at the pre-indictment stage.

The language of the two-pronged test indicates that the Supreme Court assumed that any access questions should revolve around some sort of hearing or pretrial process, and indeed every Supreme Court access case has revolved around a particular hearing. However, the test does not fit for documents, such as search warrants in pre-indictment, post-execution stages, that are not integral to any particular proceeding. The lower courts' reviews of the search warrant access cases are flawed since the courts rely on the two-pronged test for their analyses, and seek to analogize search warrants from a post-execution, pre-indictment stage to hearings that have been recognized as accessible or inaccessible. The courts find certain court proceedings, such as grand jury sessions or suppression hearings, which have been determined through precedent to be accessible or inaccessible, and analogize post-arrest, pre-indictment warrants to the warrants involved in those proceedings. The courts analogize these various types of warrants by looking for similarities in their use and application. When a document lacks an integral relationship to any proceeding, then that document's accessibility should be determined by an examina-

271. In the search warrant cases discussed above, the government raised the issue of having persons other than the searched individual tipped off about the investigation. *In re Gunn*, 855 F.2d at 574.


273. See *In re Newday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (holding that after the defendant has entered a plea agreement, his privacy interest in keeping search warrants sealed is diminished); *In re Gunn*, 855 F.2d at 573 (noting that suppression hearings traditionally are open because they are an integral part of the criminal trial and suppression issues often determine the outcome of criminal prosecutions).

274. See supra note 117 (discussing *Press-Enterprise I* and *Press-Enterprise II*).
tion of that document alone. The analogies that the various circuits draw between search warrants themselves and the various stages of criminal prosecutions that the warrants are associated with are not compatible with the post-execution, pre-indictment stage of these warrants. Therefore, the search warrants should be examined for what they truly are: judicial documents.

2. The Two-Pronged Test Is Flawed: Overreliance on History

If courts were to apply the two-pronged test to search warrants themselves, rather than to certain judicial proceedings, they would face a difficult task. Examining the historical basis of access to the search warrant itself poses many problems.\(^\text{275}\) Public access to search warrants prior to the initiation of a criminal proceeding was simply not addressed in the historical development of the warrant requirement, and no uniform policy on access can be gleaned from the literature on the topic.\(^\text{276}\) Due to the lack of an historical background on search-warrant access, any access determination test employing a history-of-access requirement would automatically deny access to these warrants. Furthermore, the history-of-access requirement inadequately deals with modern problems and is of dubious worth. The importance of ensuring access compels the development of an access determination test that is not dependent upon history.

The Press-Enterprise II history-of-access requirement is suspect for several reasons. A review of the application of the requirement by the courts shows an inconsistency concerning how history should be viewed. The reliance on history fails to reflect changes in our society as well as in the court system itself. In addition, basing access determinations on traditions in England and colonial America is unacceptable, as those traditions are significantly different from the expectations of American society today.

a. Inconsistent application

In the judicial proceeding access cases, the Supreme Court has applied its historical analysis inconsistently, varying the degree that history is to be emphasized, or disregarding prior Court determinations of historical access rights. In Globe the Court de-emphasized the historical role of access, ignoring evidence of a lack of access to trials involving sexual abuse of minors, when it held that the media could attend those trials.\(^\text{277}\) In Press-Enterprise II, the

275. The difficulty in tracing the traditions of access to search warrants may have been the reason the courts in the search warrant access cases turned to the history of warrant proceedings and suppression hearings, where the history is clearer. See supra notes 266-69 and accompanying text.

276. Seattle Times Co. v. United States Dist. Court, 845 F.2d 1513, 1516-17 (9th Cir. 1988) (citing Charles A. Reynard, Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?, 25 Ind. L.J. 259, 266 (1950) (reviewing the historical basis of the Fourth Amendment)). See generally Brantman & Martinsen, supra note 136, at 788-92 (criticizing the historical prong of the two-pronged test).

Court blatantly disregarded its holding in *Gannett*, decided only a few years earlier, where it denied access to pretrial proceedings, and held that a tradition of access to pretrial proceedings did, in fact, exist. Experience with other legal concepts, such as habeas corpus, has proven that reliance on historical standards when the historical record is barren leads to inconsistent application by the courts. Courts and commentators have rejected the use of historical analysis in fashioning modern legal rules in areas such as Seventh Amendment law and the Establishment Clause because of the confusion that would result from an inaccurate historical record. When analyzing the access cases under an historical approach there is little certainty involved since a creative reading of history is permitted in every instance. Courts may either choose to ignore certain historical evidence, or may confuse themselves by lengthy determinations of whether an historical basis of access is sufficient enough to confer a constitutional right of access.

b. Role of modernization

Additionally, historical analysis does not take into account modernization. The modernization consideration manifests itself in two ways: the technological advances in mass media, and the changes in the trial processes themselves.

In today's electronic age, modernization of the media has resulted in more intense coverage of news events and more exhaustive investigations of government activities, a trend unanticipated by the founding fathers. As the media has increased the intensity of its investigations, and as our political culture constantly moves towards openness and communication, the public also has come to expect more information. Indeed, the Supreme Court has noted that "differences in the characteristics of new media justify differences in the

---


First Amendment standards applied to them. Technological advances in communication, as well as transportation, have ended the insularity once provided by distance, forcing us to confront factors we were once free to ignore. The passage of the Freedom of Information Act and state sunshine laws explicates our compulsion for openness. These changes should be considered in access determinations, while a focus on history ignores them.

Additionally, the process of criminal investigation and prosecution has changed fundamentally over the years. Today the focus of many trials can be at the warrant stage or at pretrial hearings. As the Third Circuit has held, “It is clear that the relative importance of pretrial procedure to that of [the] trial has grown immensely in the last two hundred years.” A review of some of the most significant Supreme Court decisions of the past thirty years in which pretrial proceedings played a central role demonstrates that many things have been read into pretrial proceedings absent an historical basis. For instance, pretrial proceedings such as suppression hearings must determine whether the exclusionary rule must be applied or whether Miranda warnings have been read to defendants.

Many modern pretrial hearings were unheard of at common law or in England; thus it is unfair to require a history of access to something that is a recent development in the court process. Furthermore, even if certain pretrial proceedings had existed in England in the Middle Ages, that nation’s restrictive approach to speech casts doubt on an access analysis revolving around English customs. By denying a right of access to the judicial process at an early stage, where a majority of the litigation is disposed of, the public has essentially been denied a right of access. Historical analysis does not con-

284. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (holding that the immense reach of radio and television frequencies along with their finite nature permit governmental regulation of their use); see United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (“Thus . . . the first amendment is to be interpreted in light of current value and conditions.”); State v. Williams, 459 A.2d 641, 648 (N.J. 1983).
286. Collins, supra note 2, at 760.
287. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (finding that preliminary hearings had increased in importance in modern times).
291. See Fleming, supra note 288, at 633-34.
c. Emphasis on English precedent

The historical analysis requires that courts examine ancient case law approaches to access. Thus they often turn to English case law to determine how American courts should act. This method is of dubious merit since the English have no corresponding First Amendment and have an erratic history of protecting freedom of speech and the press. Injunctions against publication and extensive government secrecy are viewed as consistent with freedom of speech in England. Additionally, the English tradition regarding access to judicial records has been significantly different from the experience in the United States. In American courts, individuals seeking access to judicial records could do so without showing any special need, while in England, nonlitigants seeking access to court records were required to demonstrate a proprietary interest in the document or to show a need for the document as evidence in another lawsuit.

The Supreme Court has previously criticized a blind reliance on British common law: "[T]o assume that English common law in this field [speech rights] became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" Furthermore, American courts have already turned away from English precedent in areas other than First Amendment law. The Supreme Court has rejected English precedent in admiralty jurisdiction, the right against self-incrimination, and recovery of damages in tort suits. In fact, the Supreme Court has held that in cases where English precedent is vague or nonexistent, American courts should not look there


294. James Madison noted, "[T]he freedom of the press and the rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." Bridges v. California, 314 U.S. 252, 264-65 (1941) (citing 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)); see also Collins, supra note 2, at 761 ("[N]o constitutional text exists in Britain. Accordingly, the common law and tradition determine constitutional norms. They accommodate a different view of freedom of speech and of the press.").

295. Collins, supra note 2, at 761.

296. See Rasmussen, supra note 127, at 123.


299. See Fisher v. United States, 425 U.S. 391, 420 (1976) (Brennan, J., concurring) (rejecting an invocation of the right against self-incrimination for subpoenas of a taxpayer's tax information held by the taxpayer's accountant where the invocation relied on the tide of English precedent on the subject).

at all. Additionally, many commentators have argued against reliance on English precedent for dynamic legal issues such as the rule against perpetuities and impeachment law. Oliver Wendell Holmes stated the sentiment most vociferously when he wrote that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Thus, the reliance on English customs regarding free speech issues, and especially their traditions pursuant to judicial documents such as search warrants is misapplied.

3. The Balancing Test is Preferable

A balancing approach in the area of search warrant access is the most coherent approach. Under the common law qualified right of access, where access is presumed, a balancing method already takes place. The standard used for balancing should be altered, however. The Supreme Court in Nixon held that once a common law right of access was created, a balancing approach was to be applied where all the interests involved should be balanced equally. However, since decisions like Richmond Newspapers and Press-Enterprise II, several lower courts have applied a stronger presumption of access to a common law balancing approach. The strict scrutiny balancing approach would ensure access while also protecting other competing interests, where necessary.

The strict scrutiny balancing approach would be similar to the position taken by the Baltimore Sun court. There, the court did not find a First Amendment right of access to the search warrants, but it did find a common law right of access. Its version of the common law right of access, however, was potent enough to grant the public the same access privileges as a constitutionally bestowed right of access. The Baltimore Sun approach applies a strict scrutiny analysis to the common law qualified right of access, so that any

301. See Peyton v. Rowe, 391 U.S. 54, 65-66 (1968) (reversing lower court ruling and overturning previous Supreme Court holdings that did not permit a habeas corpus challenge by a consecutive-term prisoner not yet serving sentence for a later criminal conviction, and instead holding that previous decisions relied on English historical interpretations of habeas relief although English courts did not use consecutive-term prison sentences).


303. Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 TEX. L. REV. 1, 36-38 (citing IRVING R. BRANT, IMPEACHMENT: TRIALS AND ERRORS 3-23 (1972) (arguing for a diminished role for English precedent in Congress' impeachment powers)).

304. Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897) (arguing for a greater reliance on economics in law rather than on historical standards).

305. See generally Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989) (holding that the court is to balance the various interests with its "sound discretion").

306. Id.; see supra notes 129-31 (discussing lower court holdings granting a strong presumption of access).

307. Baltimore Sun, 886 F.2d at 64-65.

308. Id.
interest competing with the right of access must be compelling and narrowly tailored to serve that interest. This approach makes the difference between the common law right of access and the First Amendment right of access nonexistent. Both the First Amendment and common law rights of access would presume disclosure and require compelling, narrowly tailored reasons to deny access.

To determine whether a First Amendment right of access to search warrants exists, the two-pronged test should be abandoned. The test is designed for judicial hearings, and application of the test to judicial records that are not integral to a particular proceeding leads to questionable reasoning on the part of the courts. Since documents such as search warrants have a limited historical record, the application of the “history-of-access” requirement to documents is inconsistent with the contemporary ideals of openness. Instead, a court should presume the existence of both a First Amendment and common law qualified right of access to search warrants and apply a balancing approach in which only compelling interests would overcome the presumption of access.

The balancing approach that presumes access offers more advantages than an approach relying on historical standards of access. A balancing approach would take into account the modernization of the media and the contemporary values held by citizens who seek expanded knowledge about the criminal justice system and the government as a whole. The balancing approach also allows increased access to certain judicial functions or documents that have no tradition of openness due to their relative unimportance in the past. Finally, the balancing approach would reflect public concern for cases involving massive governmental investigations or improprieties in major industries supported by taxpayers.

B. Application: The Weighing of Interests

Unlike the Press-Enterprise II test, a balancing approach would presume that a First Amendment and common law qualified right of access exists to search warrants. Thus, when applying the test the focus would be only on balancing of interests.

In search warrant cases the weighing of interests must be done on a case-by-case basis. But by applying a strict scrutiny balancing test, access would be more likely. The strict scrutiny test that is applied when a qualified First Amendment right of access is found would require courts to find less restric-

309. Id. at 65.
310. Note how the search warrant access courts analogized search warrants to suppression hearings and warrant proceedings without explaining why they choose those particular proceedings as their benchmarks. See supra notes 214, 231, 236 and accompanying text.
311. See supra notes 152, 153 and accompanying text (detailing the historical record of search warrants).
312. See Hayes, supra note 25, at 1136.
313. Id.
tive alternatives to nondisclosure and require a compelling interest to overcome the presumption of access. By requiring less restrictive alternatives, the public could gain access to at least a reduced portion of the search warrants or affidavits.

Public access insures benefits to the court system and society in general. Judicial and prosecutorial misconduct can be abated with public scrutiny of the warrant process, thereby benefitting both the court system and the warrant process. Society in general benefits from access since citizens can check their government more effectively, either by seeing what the government is investigating or observing the actions of publicly funded industries. Society also profits from the therapeutic value of open justice and from the educational role that access to the court system provides.

The benefits of access must be balanced, however, against the concerns of both the searched individual and the government. The searched individual's privacy and reputation interests are important. However, in order to accord proper deference to the interests of access, a higher standard of proof of harm should be applied to an individual's privacy concerns. A searched individual should be made to prove that information contained in the search warrants invades his or her privacy to such an extent that it rises to the level of “intensified pain,” as opposed to the approach that only requires a showing of embarrassment. The intensified-pain standard would not permit closure because of unflattering or negative information about an individual unless it dealt with intimate or libelous statements or recordings. The intensified-pain standard is especially appropriate when the searched individual has been acting in a capacity as an employee of a corporation. A high standard of damages in privacy invasions would balance the interests of the individual and the public in the most effective way. The higher standard would recognize the public's legitimate interest in knowledge of governmental activities, while still protecting those individuals who would suffer emotional trauma from the disclosure of private information.

The governmental interest in law enforcement is important also, and certainly the public reaps benefits from successful law enforcement activities. However, there must be a point where the concern for effective law enforcement is outweighed by the public's interest in the information. The prolifer-

315. See supra note 190 and accompanying text (noting that the public may have an interest in seeing how the government chooses to spend its tax dollars).
317. See supra note 177 (noting that some courts have held that only information causing "intensified pain" to an individual can be suppressed).
318. See supra notes 183-85 and accompanying text (noting that courts are less willing to protect corporate privacy or reputation interests than the privacy interests of individuals).
319. The determination of whether the government's interest in law enforcement still exists should be made by the court (rather than for the court to wait until the government tells the court that its interest no longer exists), and it might vary from case to case. However, logic dictates that
ation of sealing orders involving governmental investigations could prevent the public from seeing potential governmental misconduct in investigations or governmental failures in law enforcement. Although law enforcement is crucial to a civilized society, the power to enforce the law cannot be accorded to persons or organizations without the existence of checks in the system so that the public can determine whether the power is exercised properly. The most effective check is public scrutiny.

When determining whether a compelling interest that would overcome the presumption of access exists, courts should give great deference to the First Amendment issues that the Supreme Court outlined in its line of court access cases.

**CONCLUSION**

Initially, courts were reluctant to recognize a right for citizens to gain access to information or places. However, as First Amendment theory progressed, the Supreme Court recognized a structural aspect to the First Amendment that allowed citizens to receive and acquire information, since this form of communication was crucial to the duty of its citizens to govern themselves. The Supreme Court has been most active in applying this right to acquire information in judicial proceedings where access to trials and pretrial proceedings is guaranteed. However, the Court has not found the opportunity to extend this right of access to judicial documents. To preserve and advance the tenets expressed in the court access cases, this right should be extended to judicial documents. Search warrants must be included among those documents that merit accessibility.

Currently, requests for access to sealed search warrants are analyzed under the *Press-Enterprise II* standard. From both a legal and an analytical standpoint, the application of this standard to search warrants is undesirable. The approach has led to questionable reasoning by the various circuit courts of appeals that have reviewed requests for access to search warrants. Lower courts, assigned the task of determining whether certain search warrants should be sealed, have received the message that access should or should not exist depending on the integral proceeding to which they choose to apply the two-pronged test. Thus, a lower court can basically choose whether to allow access, and then apply the two-pronged test to the proceeding that happens to fit their desired result. If a court opposes access, it can apply the two-pronged test to warrant issuance proceedings and find no tradition of access; if a court favors access, it can apply the test to suppression hearings and find a history of access. This lack of predictability is unacceptable because it will allow courts to decide access issues based on their predilections towards First Amendment theory and the media. Alternatively, a presumption of access, which has both

in large governmental investigations, the secrecy of their operation is short-lived since so many people are involved, and the media has access to at least press releases that might give clues to the scope of the probe and possible targets.
First Amendment and common law endorsement, would create predictability within the court access case law. The presumption of access would reflect modern American concepts of openness and knowledge of governmental activities. Without a presumption of access, a trend toward granting sealing orders in criminal cases could begin, a trend already recognized in civil litigation.

A proliferation of sealing orders in criminal cases is undesirable. Sealing search warrants prevents the public from profiting from the benefits conferred by knowledge of governmental activities. By being denied access to search warrants involved in massive governmental investigations the public is rendered unaware of the activities of its law enforcement representatives. If the public is given greater access rights to search warrants it will be able to better monitor these law enforcement activities. Increased access potential will allow the public to act as a check on governmental misconduct or malfeasance. Additionally, denial of access to search warrants involving investigations of industries that are publicly financed fails to allow the public to see what becomes of its tax dollars. Generally, any increased access rights would serve educational and therapeutic purposes also. The public would have more knowledge of its judicial system and the warrant process, and this understanding would help in preserving these systems. The public would also be aware that the government is taking law enforcement actions so the public can perceive that justice is being served.

Under the current system the government has been able to place itself in a shroud of secrecy. The only details from governmental law enforcement activities that are available to the public are those that the government chooses to release to the public in press releases. If courts granted the public a right to access at an earlier stage of the criminal justice process the government would be held more accountable. A lack of accountability is threatening because of the potential for judicial and prosecutorial misconduct.

A presumption of access would create consistency in court evaluations of access requests to search warrants, and would provide the benefits of public awareness of governmental activities. A system of secrecy in government and the courts is not consonant with today's expectations of openness. The presumption of access to search warrants and discouragement of sealing orders in general would enable citizens to better exercise their privilege of self-government.

*Peter G. Blumberg*