Golden Gate University Law Review

Volume 20
Issue 1 *Ninth Circuit Survey*

Article 8

January 1990

Constitutional Law - Times Mirror Company v. United States: Media's Request for Public Access to Pre-Indictment Search Warrant Materials Denied

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CONSTITUTIONAL LAW

TIMES MIRROR CO. v. UNITED STATES: MEDIA'S REQUEST FOR PUBLIC ACCESS TO PRE-INDICTMENT SEARCH WARRANT MATERIALS DENIED

I. INTRODUCTION

In *Times Mirror Co. v. United States of America*,[1] the Ninth Circuit held that the first amendment does not give the public a qualified right of access to pre-indictment search warrant materials during an ongoing criminal investigation.[2] Additionally, the court declined to find a right of access to pre-indictment search warrant materials under the common law[3] or section 41(g) of the Federal Rules of Criminal Procedure.[4] The issue of whether the public has a constitutional right of access to warrant materials before an indictment has been handed down was a matter of first impression in the Ninth Circuit.[5] In a previous Ninth Circuit decision, the court held that trial courts have the power to seal search warrants and related materials within constitutional limits.[6] However, the boundaries of those limits

1. 873 F.2d 1210 (9th Cir. 1989), *reh'g denied* (per Norris, J.; the other panel members were Schroeder, J. and Alarcon, J.).

2. *Id.* The court's holding was narrow. It did not consider whether the public had a right of access to search warrant materials after an indictment had been returned or after an investigation had been completed. *Id.* at 1221.

3. *Id.* at 1219-20. The appellants argued that even if no first amendment right of access existed, there was a common law right to inspect and copy public records and documents. *Id.* at 1219.

4. *Id.* at 1221. 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."

5. *Times* at 1212 n.3.

6. *See* Matter of Sealed Affidavit(s) to Search Warrants, 600 F.2d 1256 (9th Cir.

had not been previously defined.[7]

II. FACTS

In June of 1988, the Federal Bureau of Investigation ("FBI") conducted a nationwide investigation into allegations of fraud and bribery in the defense contracting industry.[8] As part of the investigation, the FBI obtained search warrants from magistrates in the United States District Court for the Central and Southern Districts of California.[9] After the warrants were issued and executed, the FBI prepared an inventory of the items seized[10] and filed the list, along with the search warrants and supporting affidavits, with the clerk of the court in each district.[11]

At the government's request, the magistrate in each district ordered that the warrants and supporting documents be maintained under indefinite seal.[12] The Times Mirror Company, KCST-TV Channel 39, and The Copley Press, Inc. [hereinafter "the media"] petitioned the district courts for an order unsealing the warrant materials.[13]

In the central district, the magistrate ordered the documents unsealed.[14] However, the government secured a stay and appealed.[15] On appeal, the district court reversed the magistrate's order on grounds that the public's access rights did not outweigh the public's interest in an unfettered criminal

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1979) (trial court improperly concluded that federal courts lacked authority to seal documents; case remanded for consideration of whether sealing was appropriate).

7. *Times* at 1212 n. 3.

8. *Id.* at 1211.

9. *Id.* This investigation originated in the Eastern District of Virginia and was known as "Operation Ill-Wind." *Id.* The investigation involved the issuance and execution of more than 40 search warrants across the United States. *See* In Re Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 570 (8th Cir. 1988) (media request for access to search warrant materials denied).

10. *Times*, 873 F.2d at 1211.

11. *Id.*

12. *Id.*

13. *Times*, 873 F.2d at 1211-12. Two separate original actions were filed by the media in the United States District Courts for the Central and Southern Districts of California requesting access to the warrant materials which were filed with the court clerk in each district. *Id.*

14. *Id.*

15. *Id.*

investigation.[16]

In the southern district, the magistrate denied the motion to unseal the documents.[17] The media appealed[18] and the district court affirmed.[19] The southern district court ruled that there was no first amendment right of access to pre-indictment warrant materials and the government's interest in maintaining secrecy during a criminal investigation was more important than the common law right of access.[20] The media next appealed the district courts' decisions[21] denying access and the cases were consolidated for purposes of the *Times* appeal.[22]

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16. *Id.* In the central district, Judge David V. Kenyon reviewed Magistrate Reichmann's ruling ordering unsealing of the search warrant affidavits and determined that the government had shown that the ruling was clearly erroneous or contrary to law. Judge Kenyon found that the government had established the necessity of keeping the documents sealed. Specifically, the investigation was at an early stage and there were very real concerns over the possible destruction of evidence or alteration of testimony. More importantly, unsealing the affidavits would divulge the scope of the investigation and the names of persons who may be involved. The Judge cautioned that the need for continued secrecy would decrease with the passage of time and at that point the press must "be able to perform its vital function of informing the public, thus helping to ensure the legitimacy of governmental proceedings." In Re Sealed Search Warrants for Premises of Teledyne Electronics, Litton Data Systems, Northrop and Fred Lackner, United States Dist. Ct. (C.D. Cal.) Misc. Nos. 21-676 and 21-679.

17. *Times*, 873 F.2d at 1212.

18. *Id.*

19. *Id.* In the district court proceeding, Chief Judge Gordon Thompson reviewed Magistrate Gonzalez's decision denying access. Magistrate Gonzalez's order stated 1) that the first amendment right of access to judicial proceedings applies if the proceedings and documents have historically been open to the public and if public access would play a positive role in the functioning of the proceeding; 2) that search warrant proceedings are not, as a rule, open to the public; 3) that law enforcement officers must obtain search warrants from neutral, detached magistrates and any suppression of evidence obtained through illegal searches operates as a check on governmental overreaching; and 4) public access to search warrant proceedings would not add appreciably to the functioning of that process. Magistrate Gonzalez concluded that although the public has a common law right of access to search warrants and related documents, the government had demonstrated a need for maintaining secrecy during its investigation and the government's need for confidentiality outweighed the public's need for access to the materials. Chief Judge Thompson found that the magistrate had appropriately balanced the competing interests and that her decision that the search warrant materials should remain under seal was not erroneous nor contrary to law. In Re Sealed Search Warrant for Cubic Corporation, United States Dist. Ct. (S.D. Cal.) Mag. No. 88-2945 (M) at 2-4.

20. *Times* at 1212. "The Supreme Court has recognized that the public has a right, founded in the common law, 'to inspect and copy *public* records and documents, including judicial records and documents.' " *Id.* at 1218 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) (emphasis added)).

21. *Times*, 873 F.2d at 1212.

22. *Id.* at 1211.

III. BACKGROUND

A. THE FIRST AMENDMENT AND THE PRESS

The first amendment guarantees freedom of speech and freedom of the press.[23] On its face, the Constitution singles out the press for special status.[24] However, in spite of what appears to be a distinct constitutional privilege, the United States Supreme Court has never granted the media special access rights superior to those of the general public.[25]

1. Prior Restraints

Tensions arise between first and sixth amendment rights when the defendant requests that a procedure be closed to avoid adverse pre-trial publicity.[26] In cases which attract a great deal

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23. The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, *or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

24. *See* Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (requiring newsmen to appear before state or federal grand juries and testify as to confidential information did not abridge the freedom of speech and press guaranteed by the first amendment). In Justice Douglas' dissenting opinion, he asserted that "[t]he press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know." *Id. See also* Stewart, *Or of the Press*, 26 HAST. L.J. 631 (1975). "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy." *Id.* at 633.

25. *See* Pell v. Procunier, 417 U.S. 817 (1974) (media requested permission to interview individual jail inmates). In *Pell*, the Court upheld a prison regulation which did not permit face-to-face interviews between the press or media and specifically named individual prisoners. *Id.* at 835. The media asserted that the regulation was an unconstitutional infringement on the freedom of the press guaranteed by the first and fourteenth amendments. *Id.* at 821. The court noted that the media's freedom to publish articles about the California prison system had not been impaired. *Id.* at 829. Additionally, the Constitution did "not . . . accord the press special access to information not shared by members of the public generally." *Id.* at 834. *See also* Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (companion case to *Pell*). The prison regulation contested by the media in *Saxbe* was essentially the same as the one in *Pell*, and the Court again concluded that the regulation did not abridge the first amendment freedom of the press because the press had exactly the same visitation rights as members of the general public. *Id.* at 850.

26. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (trial judge's failure to protect defendant from inherently prejudicial pre-trial publicity and to insulate jurors from disruptive outside influences deprived defendant of the right to a fair trial); Estes v. Texas, 381 U.S. 532 (1965), *reh'g denied*, 382 U.S. 875 (1965) (televising and broadcasting of defendant's trial was inherently prejudicial and deprived defendant of his due process rights); Irvin v. Dowd, 366 U.S. 717 (1961) (failure to transfer trial to a neutral

of public interest,[27] the issue arises as to how far the trial judge may go in an effort to protect the defendant from the effects of adverse publicity.[28]

In *Nebraska Press Ass'n v. Stuart*,[29] the Supreme Court considered whether it was permissible for a trial judge to issue an order restraining the media from publishing or broadcasting confessions made by the accused to law enforcement officers.[30] The order was implemented to protect the defendant's right to a fair and impartial trial.[31] Although the Court declined to establish a priority as between first amendment and sixth amendment rights,[32] the majority noted that any prior restraint on publica-

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venue after learning that jurors had already formed an opinion as to the defendant's guilt was a denial of due process under the fourteenth amendment).

See also Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (media restricted from publishing confessions or admissions made by the accused to law enforcement officers). In his opinion, Chief Justice Burger discussed the historical conflict between the right of the accused and the guarantees of freedom of the press. *Id.* at 547-49.

Thomas Jefferson expressed the dilemma created by an unfettered press in a letter written from Paris concerning press attacks on an accused:

> In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost.

Id. at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954)).

27. *See Sheppard*, 384 U.S. 333 (defendant accused of bludgeoning his pregnant wife to death); *Estes*, 387 U.S. 532 (defendant allegedly involved in massive swindling scheme); Rideau v. Louisiana, 373 U.S. 723 (1963) (defendant accused of bank robbery, kidnapping and murder); *Irvin*, 366 U.S. 717 (defendant arrested and tried for six murders).

28. *See* Gannett v. DePasquale, 443 U.S. 368, 378 (1979) (Constitution did not give the press or public a guarantee of access to pre-trial suppression hearings). In *Gannett*, the court noted that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *See infra* notes 29-38 and accompanying text.

29. 427 U.S. 539 (1976).

30. *Id.* at 543.

31. *Id.* Defendant was accused of sexual assault and mass murder and these crimes had attracted widespread media attention. *Id.* at 542. Defendant's attorney requested an order restricting publication of "matters that may or may not be publicly reported or disclosed to the public" because prejudicial news would make it difficult to impanel an impartial jury. *Id.* The court found that there was a "clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." *Id.* at 543. The order prohibited reporting "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused." *Id.* at 545.

32. *Id.* at 561. The Court noted that the authors of the Bill of Rights knew that

tion bears a "heavy presumption" of unconstitutionality.[33] After considering the entire record,[34] the Court found that the presumption against the use of prior restraints was not overcome.[35] The Court held that unless there was a compelling need justifying the prior restraint against publication[36] and no other measures short of restraint[37] would protect the defendant's right to a fair trial by an impartial jury, the press was free to report and comment on the judicial proceedings.[38]

2. Right of Access to Judicial Proceedings

In *Gannett v. DePasquale*,[39] the press claimed first amendment and sixth amendment rights of access to a pre-trial suppression hearing.[40] The United States Supreme Court observed

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potential conflicts existed between the first and sixth amendments and failed to "resolve the issue by assigning to one priority over the other, ..." *Id.*

33. *Id.* at 558. *See also* New York Times Co. v. United States, 403 U.S. 713 (1971) (government sought to enjoin the New York Times and the Washington Post from publishing classified information on the Viet Nam conflict); Near v. Minnesota, 283 U.S. 697 (1931) (Minnesota statute enjoining publishers from producing "a malicious, scandalous and defamatory newspaper, magazine or other periodical" held unconstitutional).

34. *Id.* at 562. In order to determine if the order restraining publication was justified, the Court applied the test developed by Justice Learned Hand in United States v. Dennis, 341 U.S. 494 (1951). The test is "[w]hether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510. In *Nebraska*, the record showed that the trial judge could have reasonably concluded that the pervasive publicity would impair defendant's right to a fair trial. *Nebraska*, 427 U.S. at 562-63. However, these conclusions were speculative. *Id.* Also, the record failed to show that alternatives to prior restraint would have been ineffective. *Id.* at 563. Further, the effectiveness of prior restraints in deterring prejudicial publicity was questionable. *Id.* at 566-67. The court stated that "[r]easonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require." *Id.* at 569.

35. *Id.* at 570.

36. *Id.* at 562-63. In Justice Brennan's concurring opinion in *Nebraska*, he noted that prior restraints on publication would be tolerated in an "extremely narrow class of cases". *Id.* at 726. Specifically, prohibitions against publication may be permitted if National security is threatened. *Id.*

37. *Nebraska*, 427 U.S. at 563-64. Alternatives to prior restraint were discussed in Sheppard v. Maxwell, 384 U.S. 333 (1966). They include (a) change of trial venue; (b) postponement of trial until the threat of prejudicial publicity abates; (c) insulating witnesses from the press; (d) extensive voir dire to screen out jurors with fixed opinions as to guilt or innocence; (e) clear instructions on the sworn duty of each juror; and (f) sequestration of jurors, if necessary. *Id.* at 357-63.

38. *Nebraska*, 427 U.S. at 570.

39. 443 U.S. 368 (1979).

40. *Id.* at 369.

in its opinion that "the Constitution nowhere mentions any right of access to a criminal trial on the part of the public . . . ."[41] The sixth amendment guarantees a speedy and public trial by an impartial jury[42] but these are rights which are personal to the accused.[43]

3. Public Access to Trials

Richmond Newspapers, Inc. v. Virginia[44] was the first case to consider whether the Constitution guarantees the public the right to attend an open criminal trial.[45] The opinion discussed the history of public criminal trials at length,[46] the importance

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41. *Id.* at 379. The Court summarily dismissed the first amendment claim. *Id.* at 391-92. The Court noted that the trial court's decision to close the hearing was based on two factors: First, the District Attorney was allowed to state his objection to closure and was granted an opportunity to be heard. *Id.* at 392. Second, the trial court balanced the public's right of access against the defendant's right to a fair trial and concluded that the press could be excluded from the suppression hearing because of the likelihood of prejudicial publicity. *Id.* at 392-93. Because the trial court properly balanced the competing interests and because the denial of access was only temporary, the Supreme Court concluded that the first amendment right of access to attend criminal trials was not violated. *Id.* at 393.

42. The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

43. *See Gannett*, 443 U.S. at 379-80. The issue in *Gannett* was not whether the defendant could compel a *private* trial but whether the press or public have an independent enforceable right to a *public* trial. *Id.* at 382-83 (emphasis added). The Court held that even if a common law right existed for the public to attend a criminal trial, there was no correlative common law right to attend a pre-trial hearing. *Id.* at 387.

44. 448 U.S. 555 (1980).

45. *Id.* at 563-64. Defendant's first conviction was reversed on appeal for admission of improper evidence; the second and third trials ended in mistrials. At the defendant's fourth trial on a murder charge, the judge ordered the press and the public excluded from the courtroom without first considering whether there was any justification for closure, whether alternatives to closure were available or whether the press or public had any constitutional right to attend the trial. *Id.* at 580-81. During the closed trial, at the conclusion of the Commonwealth's evidence, the court again declared a mistrial and found the accused not guilty of murder. *Id.* at 562.

46. *Id.* at 564-69. In England, before the Norman conquest, cases were brought before local courts which were attended by the freemen of the community. *Id.* at 565. Since that time, although changes in procedure have occurred, "one thing remained con-

of maintaining openness,[47] and the guarantees of freedom of speech and of the press.[48] The Court wrote: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[49] The Court noted that the trial judge failed to state for the record reasons supporting closure, failed to consider any alternatives to closure, and failed to consider the constitutional right of the public and press to attend the trial.[50] The Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[51]

In *Globe Newspapers Co. v. Superior Court*,[52] the Court again confronted the issue of whether the press and public could be barred from a criminal trial.[53] Under a Massachusetts statute mandating closure,[54] the public and press were barred from the

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stant: the public character of the trial at which guilt or innocence was decided." *Id.* at 566. This free access was also an attribute of the judicial system in colonial America. *Id.* at 564. "[H]istorical evidence demonstrates conclusively that . . . criminal trials both here and in England [have] long been presumptively open." *Id.* at 569.

47. *Id.* at 571-73. The Court observed that when a shocking crime occurs, the community reacts with outrage and public protest. *Id.* at 571. Thus, openness serves a "prophylactic purpose" because it provides an outlet for community concern, hostility and emotion, and satisfies the public's need to see that justice is carried out effectively and without abuse. *Id.*

48. *Id.* at 577-81. The State argued that there was no express constitutional guarantee giving the public the right to attend criminal trials. *Id.* at 579. However, the Court held that the explicit first amendment guarantees would be meaningless if the right to attend criminal trials could be discretionarily withheld. *Id.* at 576-77.

49. *Id.* at 572.

50. *Id.* at 580-81. The Court recognized alternatives to closure which might be implemented to ensure that the defendant receives a fair trial, however, in *Richmond* the Court declined to list the circumstances which might justify the closure of all or part of a criminal trial. *Id.* at 581 n.18. The Court stated that the right to attend a criminal trial was not absolute and that a trial judge could impose reasonable time, place and manner restrictions on access to judicial proceedings as long as those restrictions did not seriously infringe on first amendment rights. *Id.*

51. *Id.* at 581.

52. 457 U.S. 596 (1982) (Massachusetts statute barring press and the public from criminal trials during the testimony of a rape victim violated the first amendment).

53. *Id.* at 598.

54. MASS. GEN. L. ch. 278, section 16A (West 1981) provides in part:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

courtroom during the testimony of a rape victim under the age of eighteen.[55]

The Court in *Globe* stressed the importance of access to criminal trials in order to protect first amendment rights.[56] The Court found that the right of access to criminal trials deserved first amendment protection because criminal trials have historically been open to the press and public[57] and access to criminal trials plays a significant role in the functioning of the judicial process.[58] Having established that first amendment rights were implicated, the Court applied a strict scrutiny standard: The press and public cannot be barred from criminal trials unless the government can show that there is a compelling interest justifying closure[59] and the order is narrowly tailored to effectuate that interest.[60]

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55. *Globe*, 457 U.S. at 598.

56. *Id.* at 603-04. In *Globe*, the Court conceded that the first amendment did not explicitly grant access to criminal trials. *Id.* at 604. The Court noted, however, that one of the purposes of the first amendment was to encourage "free discussion of governmental affairs" and access to criminal trials ensures that the discussion of these affairs will be an informed one. *Id.* at 605.

57. *Id.* at 605. From the time the country's laws were adopted to the present, criminal trials have been presumptively open to the public. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). In his concurring opinion in *Richmond*, Justice Brennan said that the tradition of access was significant because the "Constitution carries the gloss of history" and because a "tradition of accessibility implies the favorable judgment of experience." *Id.* at 589.

58. *Globe*, 457 U.S. at 606. The Court observed that access to criminal trials was particularly significant for a variety of reasons:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id.

59. *Id.* at 607. The state argued that closure was justified in order to protect the minor victim from embarrassment and further trauma and to encourage truthful testimony. *Id.*

60. *Id.* at 607. The Court found the Massachusetts statute overly broad. *Id.* at 609. It noted that determination of closure on a case-by-case basis would confine closure to those cases where denial of access was absolutely necessary to protect the state's interest. *Id.*

In *Globe*, the Court agreed that protecting the minor victim from trauma and embarrassment was a compelling interest, however, the mandatory closure rule was not narrowly tailored.[61] Additionally, the state's interest in encouraging truthful testimony did not warrant a mandatory closure rule.[62] For these reasons, the Court held that the Massachusetts statute violated the first amendment.[63]

4. Access to Other Criminal Proceedings

In *Press-Enterprise Co. v. Superior Court of California*, (hereinafter *Press-Enterprise I*),[64] the right of access to criminal trials was judicially extended to include voir dire proceedings.[65] In *Press-Enterprise I*, all but three days of the six-week voir dire proceeding were closed to the public and the newspaper's request for transcripts of the proceeding was denied.[66] The hearings were closed to protect the privacy interests of prospective jurors.[67] The Court articulated standards to be used by trial courts when determining whether a proceeding should be closed to the public.[68] The Court held that "[a]bsent consideration of alternatives to closure,[69] the trial court could not constitution-

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61. *Id.* at 608. The Court felt that closure could easily be determined on a case-by-case basis taking into account such factors as the "minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.*

62. *Id.* at 609. The state failed to offer any support for its theory that the automatic closure rule contained in the Massachusetts statute would encourage truthful testimony. *Id.* The claim was not only speculative but illogical. *Id.* at 609-10. Even though the press and public were barred from the courtroom, they still had access to the trial transcripts and other records which would provide them with an account of the victim's testimony. *Id.*

63. *Id.* at 610-11.

64. 464 U.S. 501 (1984) (rape and murder of a teenage girl).

65. *Id.* at 503.

66. *Id.* at 503.

67. *Id.* at 511.

68. *Id.* at 510. After it has been determined that the proceeding has a history of openness and that openness enhances the judicial proceeding:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id.

69. *Id.* at 511. The Supreme Court noted that the trial involved the alleged rape of a

ally close the voir dire."[70]

The standards set out in *Globe*[71] and in *Press-Enterprise I* have been applied in subsequent cases to justify access to preliminary hearings,[72] post-trial documents,[73] and pre-trial release documents.[74] However, first amendment accessibility rights have not been recognized in cases where the proceeding has traditionally been closed to the public.[75] The first amendment was not designed to shed light on information and materials securely

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young girl and, for that reason, some of the questions asked of the jurors may have been sensitive in nature. *Id.* In spite of this, the trial court should have considered alternatives to complete closure that would have protected the privacy rights of the potential jurors without infringing on the public's right of access to the voir dire proceeding. *Id.* at 512. For instance, the trial judge could have informed the potential jurors of the nature of the questions and those individuals who would have been embarrassed by public questioning could have requested an opportunity to present the problem to the judge in private. *Id.*

70. *Id.* at 511.

71. *See supra* text accompanying notes 57-60.

72. *See* Press-Enterprise v. Superior Court of California, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*]. In *Press-Enterprise II*, the defendant, a nurse, was accused of murdering 12 patients by administering massive doses of cardiac medication. *Id.* at 3. On defendant's motion, the trial court excluded the press and the public from the 41-day preliminary hearing and opposed Press-Enterprise's motion to have a transcript of the preliminary hearing released. *Id.* at 5. The trial court concluded there was a "reasonable likelihood" that prejudice would result from publication of the transcript. *Id.* The United States Supreme Court held that the first amendment requires more than a reasonable likelihood of prejudice. *Id.* at 14. There must be a "substantial probability" that prejudice will occur and, further, the court must consider whether the interests of the accused would be protected by methods other than complete closure. *Id.*

73. *See* CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985). In *CBS*, the defendant filed a motion to reduce sentence under convictions of drug and tax evasion charges. The court held that there was no basis for affording greater confidentiality to post-trial documents than to pre-trial documents so long as the justification for the access was not outweighed by some compelling interest for closure articulated in the findings. *Id.* at 825.

74. *See* Seattle Times v. United States Dist. Ct., 845 F.2d 1513 (9th Cir. 1988). In *Seattle*, the defendant was indicted on five counts of product tampering which resulted in two deaths. *Id.* at 1514. The press demanded access to sealed documents filed in connection with the defendant's pre-trial detention hearing. *Id.* The court found no history of openness to pre-trial detention hearings. *Id.* at 1516. However, this did not foreclose a right of access if openness would play a significant role in the functioning of the proceeding. *Id.* The trial court's record failed to show that there was a "substantial probability" that irreparable damage would result if the documents were not sealed, that alternatives to closure would not adequately protect defendant's rights, and that closure would effectively protect defendant's right to a fair trial. *Id.* at 1517-18. Therefore, the public and the press had a qualified right of access to the pre-trial documents. *Id.* at 1519.

75. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (access to grand jury transcripts); Landmark Communications v. Virginia, 435 U.S. 829 (1978) (proceedings of commission investigating judicial misconduct).

within the government's control.[76] It is essential that some proceedings be conducted in secret.[77]

Although the press has a right to gather newsworthy information,[78] this right does not support the proposition that the first amendment "compels . . . [the] government to supply information."[79]

B. Common Law Right of Access to Judicial Documents and Records

In *Nixon v. Warner Communications, Inc.*,[80] the media requested access to the "Watergate Tapes" which had been admit-

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76. *See* Houchins v. KQED, 438 U.S. 1 (1978) (broadcast company requested permission to inspect and photograph a portion of the County jail where a suicide occurred). In *Houchins*, Chief Justice Burger stated that "this Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Id.* at 9. Access to information is assured "once government has opened its doors." *Id.* at 16 (Stewart, J., concurring). *See also Gannett*, 443 U.S. at 405. In Justice Rehnquist's concurring opinion, he stated that "[t]he first amendment was [not] some sort of sunshine law that required notice, an opportunity to be heard, and substantial reasons before a governmental proceeding may be closed to the public and press."

77. *See Douglas*, 441 U.S. at 223. The secrecy surrounding grand jury proceedings should not be violated unless the particularized need for disclosure outweighs the continued need for secrecy. *Id. But see* United States v. Rose, 215 F.2d 617, 630 (3d Cir. 1954). Although grand jury proceedings are traditionally conducted in secret, disclosure to defendant of defendant's own testimony would not subvert the inviolability of the grand jury proceeding. The Third Circuit summarized the reasons for secrecy in grand jury proceedings:

> (l) To prevent the escape of those whose indictment may be contemplated;
>
> (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
>
> (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
>
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
>
> (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 628-29.

78. *See Houchins*, 438 U.S. at 11. The press has a right to gather news by any lawful means and to publish any information which is lawfully obtained without restrictions. *Id.*

79. *Id.*

80. 435 U.S. 589 (1978).

ted into evidence at the trial of ex-President Nixon's former advisers.[81] The Supreme Court recognized a common law right to inspect and copy public records and documents, including judicial records and documents.[82] However, this right is not absolute.[83] "Access [may be] denied where court files might become a vehicle for improper purposes."[84] The Court observed that, as a rule, trial courts have discretionary control over their own files and records.[85] Without precisely delineating the contours of the common law right,[86] the Court assumed that it covered the tapes at issue.[87] The Court noted that it would normally undertake a balancing of the competing interests to determine if access should be granted or denied.[88] However, its need to do so in this case was disposed of by the Presidential Recordings and Materials Act.[89] The Court held that "the presence of an alternative means of public access tips the scales in favor of denying release."[90]

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81. *Id.* at 591. The news media wanted to copy the tapes for broadcast and sale to the general public. *Id.*

82. *Id.* at 597. The common law right arises even though the individual requesting access does not have a "proprietary interest" in the document requested. *Id.* Access rights may be supported by a "desire to keep a watchful eye on the workings of public agencies" or by a "newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598.

83. *Id.* at 598.

84. *Id.* The Court defined such improper purposes as the use of records "to gratify private spite or promote public scandal." *Id.* (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259, 260 (1893)). It would also be improper to use court records to facilitate the distribution of libelous statements contained in the record, or to distribute business information to a litigant's competitor. *Id.*

85. *Id.*

86. *Id.* at 599. It was difficult for the Court to "distill" a "comprehensive definition of . . . the common-law right of access or to identify all the factors to be weighed in determining whether access [was] appropriate" from the relatively few decisions that had analyzed this common-law right. *Id.*

87. *Id.* at 599.

88. *Id.* at 603. In *Nixon*, the ex-President advanced several reasons for nondisclosure. *Id.* at 600. He argued that "he [had] a property interest in the sound of his own voice . . . [which the] respondents [intended] to appropriate unfairly," that his "privacy would be infringed if aural copies of the tapes were distributed to the public," and "that it would be improper for the courts to facilitate the commercialization of these White House tapes." *Id.* at 600-01. The media urged the Court to allow access because the tapes represented an "immensely important historical occurrence" and publication would advance the public's understanding of the Watergate events. *Id.* at 602.

89. *Id.* at 603. The Act directed the Administrator of General Services to take custody of all tape recordings involving President Nixon which were recorded during the period beginning January 20, 1969 and ending August 9, 1974, to preserve them for historical interest, and to make them accessible to the public. *Id.* at 603 n.15.

90. *Id.* at 606.

1. Trial Court Discretion

As recognized in *Nixon*, the trial court has a certain amount of discretion when considering motions requesting access to judicial records and documents.[91] This discretion should be "exercised in light of the relevant facts and circumstances of the particular case."[92] Trial courts must weigh the competing interests before deciding whether to grant or deny access.[93] *Nixon* provided very little guidance on the strength of the presumption in favor of the common law right and since that time the lower courts have struggled with this question.[94]

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91. *Id.* at 599.

92. *Id. See also* United States v. Guzzino, 766 F.2d 302, 304 (7th Cir. 1985) (trial judge abused discretion when he refused to release two audio tapes introduced into evidence at trial for copying); United States v. Edwards, 672 F.2d 1289, 1293 (7th Cir. 1982) (trial court did not abuse discretion in denying access to evidence which had been admitted at trial because court considered the possibility that access would probably taint the current trial and a future trial), and In re Nat'l Broadcasting Co., Inc., 653 F.2d 609, 613 (D.C. Cir. 1981) (trial court abused discretion in denying application for permission to copy audio and video tapes introduced into evidence).

93. *See Edwards*, 672 F.2d at 1295. The trial court denied media access to audio recording introduced into evidence at trial. *Id.* at 1290. The court emphasized a strong presumption in favor of access but held that the trial court did not abuse its discretion when denial was based on the acknowledgment that adverse publicity arising from the broadcasting of the tape would make it difficult to empanel a jury in a future trial against defendant on tax evasion charges. *Id.* at 1296. *See also* United States v. Criden, 648 F.2d 814 (3d Cir. 1981) (television network requested permission to copy video and audio tapes admitted into evidence at Abscam trial for purposes of broadcasting the tapes to the public). The court in *Criden* found that a strong common law presumption of access buttressed by significant public interest in the Abscam proceedings mandated access to the materials and access would not infringe on defendant's right to a fair trial. *Id.* at 829. In granting access, the court was sensitive to information contained in the tapes which was injurious to third parties and permitted excise of the tapes before release to the media. *Id.*

94. *Compare* In re Application of National Broadcasting Co., Inc. (United States v. Myers), 635 F.2d 945, 952 (2d Cir. 1980) (only the most extraordinary circumstances will justify restrictions on the common law right of access) *with* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981) (common law right of access is merely one of the interests to be weighed in the balancing). In *Myers*, the Second Circuit relied on Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) to raise the common law right of access to constitutional dimensions. *Myers*, 635 F.2d at 951. The court noted that *Richmond* emphasized the important public interest in knowing what transpires in a courtroom and held that interest would be served by allowing access to any information entered into evidence at trial. *Id.* at 952.

See also United States v. Mitchell, 551 F.2d 1252 (1976) (networks requested copies of tape recordings introduced into evidence at trial). In *Mitchell*, Chief Judge Bazelon referred to the first and sixth amendments of the constitution in order to underscore the importance of the common law right and the "duty to tread carefully in this important

In *Valley Broadcasting Co. v. United States Dist. Court*,[95] the Ninth Circuit considered whether the media had a common law right to copy audio and video tapes as they were admitted into evidence.[96] The Ninth Circuit adopted what it termed a "middle-ground stance"[97] chosen by three of the circuits that had previously ruled on the common law access issue.[98] The Ninth Circuit found a strong presumption in favor of access.[99] Any denial of access must be supported by articulated facts based on more than mere hypothesis or conjecture.[100]

2. Review of Trial Court's Discretion

In reviewing cases where the right of access has been re-

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area." He wrote:

> This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . Like the First Amendment, . . . the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in judicial remedies."

Id. at 1258 (footnotes omitted).

95. 798 F.2d 1289 (9th Cir. 1986).

96. *Id.* at 1290.

97. *Id.* at 1293.

98. *See Edwards*, 672 F.2d at 1294 (7th Cir. 1982) ("there is a strong presumption in support of the common law right to inspect and copy judicial records"); *Myers*, 653 F.2d at 613 (D.C. Cir. 1981) (access may be denied only if, after weighing the competing interest, the court concludes that "justice so requires"); and *Criden*, 648 F.2d at 823 (3d Cir. 1981) (strong presumption that material introduced into evidence at trial should be accessible).

99. *Valley*, 798 F.2d at 1293. Even though the common law right serves to protect the same interests protected by the first amendment, the Ninth Circuit did not find that the common law right reached constitutional dimensions. *Id.*

100. *Id.* at 1294. The Ninth Circuit reviewed the district court's denial of access for abuse of discretion. *Id.* The record showed that considerations which supported nondisclosure had been articulated by the trial court. *Id.* at 1294-95. Specifically, providing tapes to the media on a day-to-day basis was administratively inconvenient and empaneled jurors might be tainted by trial publicity if they disregarded court instructions to avoid exposure. *Id.* The Ninth Circuit found that the administrative inconvenience was not a monumental problem because the media already had a right to publicize the contents of the tapes even if copies were not available for transmission, and the possibility of jury taint was hypothetical and not supported by the record. *Id.*

quested by the public, the task of the appellate court is to determine if the relevant factors were "considered and given the appropriate weight"[101] by the trial court.[102] Reasons given for denying access must be supported by the record.[103] A trial court may deny access if it is sought for an improper purpose[104] or if it would infringe on a defendant's right to a fair trial.[105] Additionally, access may be denied if it would invade the privacy interests of third parties[106] or if it would seriously interfere with gov-

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101. *Criden*, 648 F.2d at 819.

102. *See* In re Knoxville News Sentinel Co., Inc., 723 F.2d 470, 473-74 (6th Cir. 1983) (district court's control over its own records and documents does not mean that discretionary powers can be exercised without restraint); *See also Criden*, 648 F.2d at 818 (when the decision is not based on the particular observations of the trial court but on circumstances that are "so new that it is not yet advisable to frame a binding rule of law" the scope of review is broad). In *Criden*, the court observed that substantial deference is given to trial court decisions based on first-hand knowledge and familiarity with the proceedings. *Id.* "In those circumstances, the trial court has a superior vantage point which an appellate court cannot replicate." *Id.* The court stated that the decision whether to grant access to video and audio tapes was not dependent on the observations of the trial court. *Id.* Therefore, the review was not as narrow as in those circumstances where the trial court's decision was based on first-hand observations. *Id.* It was necessary for the trial court to articulate the reasons for its decision so that the review will be confined to "its appropriate scope — i.e., whether the relevant factors were considered and given appropriate weight . . . ." *Id.* at 819.

103. *See* United States v. Beckham, 789 F.2d 401, 413 (6th Cir. 1986) ("a mere articulation of rational justifications will not suffice . . . . A district court must set forth substantial reasons for denying such requests"); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984) (when the district court fails to articulate reasons for denying access, the appellate court is left to speculate as to the reasons for closure); Newman v. Graddick, 696 F.2d 796, 803-04 (11th Cir. 1983) (district court's decision to deny access was reversed "[b]ecause the district court did not articulate any reason for excluding the appellants that outweighed the presumption of access to the court proceedings . . . ."); *Criden*, 648 F.2d at 819 (the exercise of discretion must be supported by "the trial court's articulation of the factors considered and the weight accorded to them").

104. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); United States v. Criden, 648 F.2d 814, 825 (3d Cir. 1981) (even where the information has already been made public at trial, the right to copy may be denied if it is for an improper purpose).

105. *See id.* at 826. *But see* United States v. Mitchell, 551 F.2d 1252, 1261 (D.C. Cir. 1976) ("the risk of causing *possible* prejudice at a *hypothetical* second trial [did] not justify infringing appellant's right to inspect and copy the tapes"); United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982) (the reasons articulated for nondisclosure must not be solely supported by hypothesis or conjecture). *See also* Gannett v. DePasquale, 443 U.S. 368, 401 (1979) (press must show and the court must consider alternative procedures which would not deprive defendant of a fair trial); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563 (1976) (before access is denied for possible jury taint, alternatives must be considered).

106. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (protective order barring dissemination of information obtained through discovery did not violate first amendment); *Knoxville*, 723 F.2d at 477 (district court did not abuse its discretion when

ernment's investigation of a crime.[107] The appellate court must also be aware of abuses of discretion which occur when the trial court fails to give the opposing party notice and an opportunity to be heard.[108] Abuses are also found when the court's decision is based on "erroneous conclusions of law" or when the reasons for closure are irrational.[109] If exclusion is warranted, the court's order must be narrowly drawn.[110]

3. Access to Search Warrant Materials

In a Rhode Island district court opinion, the court observed that sealing of documents, such as affidavits filed in support of

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it removed certain exhibits containing the financial records of third parties from the court files); *Myers*, 653 F.2d at 620 (the interest in avoiding injury to third persons was properly balanced against the media's interest in access); *Criden*, 648 F.2d at 829 (portions of a tape containing libelous statements about third parties was properly excised).

107. *See generally* United States v. Proctor & Gamble, 356 U.S. 677 (1958) (transcript of grand jury proceedings); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (sealed portion of bill of particulars naming unindicted coconspirators); Offices of Lakeside Non-Ferrous Metals v. United States, 679 F.2d 778 (9th Cir. 1982) (search warrant affidavits); In re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982) (ministerial records for special grand jury).

108. *See* In re Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984) (those opposing closure must be given notice and an opportunity to be heard on the question of exclusion); *Knoxville*, 723 F.2d at 474 (district court failed to give "the press a reasonable opportunity to state their objections to its protective order"); *Criden*, 675 F.2d at 557. The Third Circuit in *Criden* set out the parameters of the due process notice:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 557-58 (quoting Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

The Third, Ninth and Sixth circuits have extended notice requirements to include those instances where requests for disclosure are made in writing or in chambers and not in open court. *See Knoxville*, 723 F.2d at 475 (6th Cir. 1983); *Criden*, 675 F.2d at 559-60 (3d Cir. 1982); and United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) (orders of district court closing voir dire, pre-trial suppression hearings and other in camera proceedings did not satisfy procedural prerequisites).

109. United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir. 1988) (disclosure of a criminal presentence report to a third party was appropriate).

110. *See* Sacramento Bee v. United States Dist. Ct., 656 F.2d 477, 482 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) (court's decision to close two short hearings after carefully considering alternatives was not error). *Id.* at 479.

search warrants, was an extraordinary action.[111] A search warrant affidavit becomes a public record on filing with the court.[112] However, denial of access may be necessary in order to serve the ends of justice.[113] Any order prohibiting disclosure must be narrowly tailored and for "good cause" and the courts must balance the right of access against a party's interest in privacy.[114]

In *Matter of Sealed Affidavit(s) to Search Warrants*,[115] the Ninth Circuit reversed the district court's order allowing access to search warrant affidavits.[116] Relying on *Nixon*,[117] the Ninth Circuit found that courts have inherent power to control their own documents and records "within certain constitutional and other limitations."[118] The Ninth Circuit held that the district court "improperly concluded that federal courts per se lacked the authority to seal affidavits."[119] Conversely, in *In re Search Warrant for Secretarial Area-Gunn* [hereinafter *McDonnell Douglas*],[120] the Eighth Circuit held that a qualified first amendment right of access extended to documents filed in support of search warrants.[121] In *McDonnell Douglas*, Pulitzer Publishing Company requested access to pre-indictment search warrant materials filed in connection with the FBI's Operation Ill-Wind

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111. *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207 (D. R.I. 1980) (in view of the fact that government failed to demonstrate any real harm from disclosure, the newspaper's motion to unseal affidavits filed in support of search warrant applications should be granted).

112. Newspapers of New England v. Clerk-Mag., 531 N.E.2d 1261, 1263 (Mass. 1988), *cert. denied*, 109 S.Ct. 2064 (1989) (no constitutional right of access to search warrant affidavit even though the affidavit was a public record because good cause existed for sealing the record prior to the defendant's indictment).

113. *Id.*

114. *Id. See also* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). "The court's duty . . . is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material . . . ." *Id.* at 223.

115. 600 F.2d 1256 (9th Cir. 1979) (alleged violations of federal law in management and control of Tropicana Hotel).

116. *Id.* at 1257. The district court unsealed the affidavits because "federal courts have no power to seal affidavits upon which search warrants are based." *Id.*

117. 435 U.S. 589 (1978).

118. *Matter of Sealed Affidavit(s) to Search Warrants*, 600 F.2d at 1257.

119. *Id.* at 1258.

120. 855 F.2d 569 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 793 (1989) (investigation into alleged bribery in defense industry).

121. *Id.* at 573.

investigation in the Eighth Circuit.[122] The court observed that there was a first amendment right of access to search warrant materials because they were not routinely filed under seal and because access would positively aid in the public's understanding of the judicial process and prevent judicial misconduct or abuse.[123] However, this recognition of first amendment rights did not support immediate disclosure.[124] The court found that release of the documents would seriously jeopardize the government's ongoing criminal investigation.[125] For that reason, and because the order was narrowly defined,[126] closure was acceptable.[127]

IV. THE COURT'S ANALYSIS

A. THE FIRST AMENDMENT

Petitioners, Times Mirror Company, The Copley Press, Inc. and Channel 39, KCST-TV [hereinafter "the media"], argued that the first amendment granted access to criminal proceedings and related documents and that search warrant proceedings were, by definition, criminal proceedings.[128] Additionally, the media asserted that openness would enhance the fact-finding process and lead to a "better-informed public."[129] The court rejected the media's argument and noted that public access would "undermine important values that are served by keeping some

122. *Times*, 873 F.2d at 1217.

123. *McDonnell Douglas*, 855 F.2d at 573. The court also observed that search warrant materials were often the subject of suppression hearings and should be treated no differently from suppression hearings which were traditionally open to the public. *Id.* Additionally, the court found that the search warrant, like the criminal trial, is an integral part of the criminal justice system and, therefore, subject to first amendment rights. *Id.*

124. *Id.* at 574. Documents may be sealed if there are compelling reasons for closure and the closure order is narrowly tailored.

125. *Id.* at 574. The affidavits contained information obtained as a result of governmental wire-taps or from confidential informants which, if disclosed, would compromise the government's criminal investigation. *Id.*

126. *Id.* at 574. Because the affidavits were extensive and, for the most part, duplicative, any line-by-line redaction of the confidential portions of the documents would be impracticable. *Id.*

127. *McDonnell Douglas*, 855 F.2d at 575.

128. *Id.* at 1212. The petitioners conceded that the first amendment rights were not absolute. *Id.* at 1211 n.1. Access may be denied if there is a compelling governmental interest necessitating closure and the order is "narrowly tailored to serve that interest." *Id.*

129. *Id.* at 1213.

proceedings closed to the public."[130] The court observed that public access to a particular proceeding has never been granted "without first establishing that the benefits of opening the proceeding outweigh the costs to the public."[131] This balancing test required the court to establish whether first amendment rights were implicated by initially examining 1) whether the proceeding had historically been open to the public and 2) whether openness would positively contribute to the functioning of the proceeding.[132]

Applying the first part of the two-part analysis, the Ninth Circuit found no historical tradition of public access to warrant proceedings.[133] The court acknowledged that search warrant affidavits and related materials become part of the public record after the search warrant is served.[134] However, this did not undermine the government's argument that there was "no history of unrestricted access to warrant materials."[135]

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130. *Id.* The Ninth Circuit stated that the criminal investigation process would be jeopardized by allowing access to certain documents or procedures such as grand jury investigations which are traditionally held in secret. *Id.*

131. *Id. See also Press Enterprise II*, 478 U.S. 1, 8-9 (1986).

132. *Times*, 873 F.2d at 1213. This two-part analysis has been applied to cases involving access to judicial proceedings. *See Press Enterprise II*, 478 U.S. at 8 (preliminary hearing); *Press Enterprise I*, 464 U.S. at 505-10 (voir dire examination); *Globe Newspapers*, 457 U.S. at 605 (criminal trial); and *Richmond Newspapers*, 448 U.S. at 589 (criminal trial) (Brennan, J., concurring). However, it also may be applied "to *documents* generated as part of a judicial proceeding." *Times*, 873 F.2d at 1213 n.4. *See also Seattle Times*, 845 F.2d at 1515-16 (pre-trial release documents); *Brooklier*, 685 F.2d at 1172 (transcripts of three closed hearings).

133. *Id.* at 1213. In fact, the opposite is true. *Id.* at 1214. Most warrants are issued by a judge or magistrate on the basis of an ex parte application made by a government official. *Id.* These ex parte proceedings are held privately in a judge's chambers. *Id. See also* Franks v. Delaware, 438 U.S. 154 (1977) (defendant had a constitutional right to challenge the veracity of statements filed in support of search warrant). Although recognizing the right to challenge the statements made in a search warrant affidavit, the court found that it would be impossible for defendant to challenge these statements before the warrant was executed because the "pre search proceeding is necessarily ex parte since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." *Id.* at 169. *See also* United States v. United States Dist. Ct., 407 U.S. 297 (1972) (government's warrantless surveillance violated fourth amendment). In that case, the court recognized the importance of conducting investigations in secret but found that warrant proceedings posed no threat to secrecy because such proceedings were not "public". *Id.* at 321.

134. *Times*, 873 F.2d at 1214.

135. *Id.* The government may apply for an order restricting access to the search warrant materials. *Id.* These requests are routinely granted during an on-going criminal investigation on a showing that confidentiality is necessary. *Id.*

Next, the court considered whether public access would play a "significant positive role in the functioning of the proceeding."[136] The court conceded that the media's arguments in favor of public access were "clearly legitimate."[137] Nevertheless, the court found that public access would severely hinder the government's ability to conduct criminal investigations.[138] Public access would alert those named in the search warrants to the fact that they were under investigation[139] and would infringe on an innocent individual's privacy rights.[140]

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136. *Id.* at 1214-15.

137. *Id.* at 1215. The media set forth three arguments in support of their position for openness of the warrant proceedings: First, open warrant proceedings are essential to self-government because observation of all aspects of the judicial process promotes open discussion of the process and serves as a check on possible governmental abuses. *Id.* Second, public scrutiny of warrant proceedings enhances the "quality and safeguards the integrity of the fact-finding process," as is true with public scrutiny of the criminal trial. *Id.* Third, open warrant proceedings and access to warrant materials would have the same "community therapeutic value" as open criminal trials, by serving as an outlet for the sense of outrage, insecurity and need for retribution that a community feels when a crime occurs. *Id.*

In Times Mirror's Petition for Rehearing, it noted that the issues raised in support of openness were of tremendous public importance—"Operation Ill-Wind" involves allegations of wrongdoing at the highest levels of our government, which directly affect the core of our system of democractic self-government — how our government is being conducted, how our tax dollars are being spent and how our military defense systems are procured." Times Mirror v. United States, United States Court of Appeals, Nos. 88-6278, 88-6279, 88-6280 and 88-7291.

138. *Id.* The Ninth Circuit found the warrant proceedings "indistinguishable" from grand jury proceedings. *Id.* If grand jury proceedings were held openly the criminal investigation process would be frustrated. *Id.* Secrecy is no less important when the government is developing evidence to present to the grand jury. *Id.*

> If proceedings before and related to evidence presented to a grand jury (including subpoenas, documents and even hearings before the court for the immunization of witnesses) can be kept secret, *a fortiori*, matters relating to a criminal investigation leading to the development of evidence to be presented to a grand jury may also be kept secret. Indeed, search warrant proceedings are one step back from the convening of a grand jury.

Id. at 1215-16. (quoting Judge Harvey, Re Sealed Search Warrants and Affidavits, Criminal No. H-88-0427, oral opinion at 12-13 (D.Md. August 30, 1988)).

139. *Times*, 873 F.2d at 1215. If search warrant proceedings were open, those named in the search warrant might destroy vital evidence before the search warrant could be executed, flee the district, or attempt to coordinate stories with alleged co-conspirators. *Id.*

140. *Id.* at 1216. The Ninth Circuit noted that individuals named in search warrants were often proved innocent after further investigation. *Id.* Further, if the warrant materials were made public, innocent parties would have no forum in which to exonerate themselves. *Id.*

As there was no history of openness to search warrant proceedings or documents[141] or any justification for openness that would outweigh the burden to the government,[142] The court held that there was no first amendment right of access to search warrant proceedings or search warrant materials during an ongoing criminal investigation prior to indictment.[143]

B. The Common Law

The media alternatively claimed it had a common law right of access[144] to the search warrant materials even if the first amendment did not secure such a right.[145] The Ninth Circuit noted that in two previous Ninth Circuit cases the court had considered the issue and had declined to find a common law right.[146] The court applied the same two tests for the common law right as for first amendment rights and held that absent a tradition of openness or any important public need justifying access there was no common law right of access to pre-indictment search warrant materials.[147] Therefore, the media's claim was

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141. *Id.* at 1218.

142. *Id.* at 1218. The court acknowledged that some positive benefits would flow from a right of access to search warrant materials. *Id.* For instance, the public would be better informed about the inner workings of government and publication would prevent governmental abuses in the warrant process. *Id.* However, these benefits would be minimal compared with the government's need for secrecy at the pre-indictment stage of its investigation. *Id.*

143. *Id.* The court acknowledged that the Eighth Circuit had taken an opposing position on the right of access to search warrant materials. *See supra* notes 120-127 and accompanying text. In *Times*, the Ninth Circuit disapproved of the court's reasoning in *McDonnell Douglas*. *Id.* at 1217. First, the fact that the warrant materials are not routinely filed under seal merely describes the normal practices of the court where the government believes that secrecy is unnecessary. *Id.* It does not establish any first amendment guarantee that warrant materials be filed without seal. *Id.* Second, "[t]he warrant process . . . which would be jeopardized if warrant *proceedings* were conducted openly would be equally threatened if the *information disclosed during the proceeding* were open to public scrutiny . . . ." *Id.* (emphasis in original). Third, access to search warrant information is not mandated by the first amendment simply because the warrant materials may become the subject of a suppression hearing at some later point. *Id.* at 1217-18.

144. *Times*, 873 F.2d at 1218. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

145. *Times*, 873 F.2d at 1218.

146. *See* In Re Special Grand Jury (For Anchorage, Alaska) 674 F.2d 778, 781 (9th Cir. 1982). (Members of the public have a right of access to files and records of the district court having jurisdiction of the grand jury, subject to the rules of grand jury secrecy). *See also* Associated Press v. United States Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983) (common law right of access does not extend to all pretrial documents).

147. *Times*, 873 F.2d at 1219. *But see* United States v. Schlette, 842 F.2d 1574 (9th

rejected.[148]

C. Federal Rule of Criminal Procedure Section 41(g)

Finally, the Ninth Circuit considered whether the media was entitled to access under Federal Rule of Criminal Procedure 41(g).[149] The media argued that because the Rule required warrant materials and accompanying affidavits to be filed with the clerk of the court, the documents were rendered "judicial records to which a presumption of openness attache[d]."[150] The Ninth Circuit found that Congress adopted Rule 41(g) with no intention of expanding first amendment or common law rights.[151] The court held that Rule 41(g) did not create new access rights[152] or expand the public's right of access beyond that previously secured by the first amendment or the common law.[153] The court found that the rule merely provided for the proper procedural transfer of warrant materials to the clerk of the court for filing.[154]

Cir. 1981). In *Schlette*, the court found a common law right of access to presentence reports which are traditionally kept confidential because the party requesting access was able to show that disclosure would serve the ends of justice. *Id.* at 1581.

148. *Times*, 873 F.2d at 1219.

149. Fed. R. Crim. P. 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."

150. *Id.* at 1219. The media relied on In re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (D. R.I. 1980) to support its claim. In *Second Floor Bedroom*, the court held that although Rule 41(g) was designed to aid the defendant in gaining access to search warrant materials, "there was every reason to suppose that the Rule was adopted to benefit the public as well." *Id.* at 208 n.1. The Ninth Circuit declined to accept the implication of *Second Floor Bedroom* that public access rights to search warrant materials existed "where none existed under either the First Amendment or the common law." *Times*, 873 F.2d at 1220.

151. *Id.* at 1220. The court found that unlike Fed. R. Crim. P. 6, the complex disclosure statute enacted to guide a trial court in situations where parties are entitled to access grand jury materials, Rule 41(g), on its face, does nothing more than provide for the filing of papers with the court. *Id.* The court felt that if Congress had intended something more, they would have drafted provisions creating access rights to warrant materials similar to those in Rule 6. *Id.*

152. *Id.* at 1221.

153. *Id.*

154. *Id.*

V. CRITIQUE

In *Times*,[155] the Ninth Circuit attempted for the first time to define the constitutional limits within which courts could exercise their power to seal search warrants and related documents and records.[156] The Ninth Circuit began its first amendment analysis by applying the two-part inquiry set forth by the Supreme Court in *Globe*[157] to determine if a first amendment right of access was implicated.[158] The court concluded that these "considerations of experience and logic"[159] did not cut in favor of a first amendment right of access to pre-indictment search warrant materials.[160]

The Ninth Circuit's first amendment analysis is confusing. Other courts have found an historical tradition of access to search warrant materials[161] and in *Times*, the Ninth Circuit acknowledged that there was a general availability to search warrant materials once they were filed with the clerk of the court.[162] Nevertheless, the court found no tradition of access to these materials. The court based this finding on the government's ability to restrict access to warrant materials in order to maintain secrecy during a criminal investigation. Therefore, the court concluded there was no history of *unrestricted* access to these documents.[163] This argument is not persuasive. The government has always been able to restrict access to any proceeding, even a criminal trial, if the need to do so was sufficiently compelling.[164] Further, neither of the two cases cited by the court in support of the denial of access dealt with the subject of search warrant materials.[165]

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155. 873 F.2d 1210 (9th Cir. 1989), *reh'g denied*.

156. *Id.* at 1213 n.3.

157. 457 U.S. 596 (1982). *See supra* notes 57-59 and accompanying text.

158. *Times*, 873 F.2d at 1213.

159. *Id.*

160. *Id.*

161. *See supra* notes 111 and 121 and accompanying text.

162. *Times*, 873 F.2d at 1214.

163. *Id.*

164. *See supra* notes 50-51 and accompanying text.

165. *See* Franks v. Delaware, 438 U.S. 154 (1977) and United States v. Unites States Dist. Ct., 407 U.S. 297 (1972); *see supra* note 133 and accompanying text.

Applying the second part of the two-part *Globe* analysis,[166] the Ninth Circuit concluded that the government's compelling need to maintain secrecy during an ongoing criminal investigation outweighed any significant positive role served by allowing access.[167] The court has undertaken a balancing of the competing interests — the media's right of access and the government's need for closure — before acknowledging that any first amendment rights existed. In *Press-Enterprise I*,[168] the Court articulated the standards for determining whether a proceeding should be closed to the public.[169] Only *after* the court finds a presumption of openness to the proceeding based on first amendment considerations should the court weigh the competing interests to determine if the procedure should be closed to the public.[170] If no first amendment rights are implicated, as the court in *Times* held, then no balancing test is required and no discussion of a compelling governmental need is necessary.

Richmond,[171] *Globe*, *Press-Enterprise I*[172] and their progeny have set the standards for first amendment analysis in right of access cases. Following these guidelines, the Eighth Circuit in *McDonnell Douglas*[173] found a qualified first amendment right of access to documents filed in support of search warrants.[174] The court based its finding on historical tradition and public importance.[175] Yet in *Times*, the Ninth Circuit specifically rejected the Eighth Circuit's reasoning supporting the implications of first amendment rights[176] and created a hybrid approach to first amendment analysis. In the end, both the Ninth Circuit and the Eighth Circuit denied the media's request for access to search warrant materials. However, each court's analysis was significantly different, a factor that may create confusion in later cases involving first amendment access rights.

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166. *See supra* note 58 and accompanying text.
167. *Times*, 873 F.2d at 1215.
168. 464 U.S. 501 (1984).
169. *See supra* note 68 and accompanying text.
170. *See supra* notes 59 and 125 and accompanying text.
171. 448 U.S. 555 (1980).
172. 464 U.S. 502 (1984).
173. 855 F.2d 569 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 793 (1989).
174. *Id.* at 573.
175. *See supra* notes 120-127 and accompany text.
176. *See supra* note 143 and accompanying text.

VI. CONCLUSION

The *Times* decision effectively forecloses any claim of a first amendment right of access to pre-indictment search warrant materials during an on-going criminal investigation. It remains to be seen whether the Ninth Circuit will recognize a common law right of access to these documents once a criminal investigation is completed or after indictments have been handed down.

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