Access to Search Warrant Materials: Balancing Competing Interests Pre-Indictment

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I. INTRODUCTION

Search warrants are a critical and frequently used tool in the criminal investigative process. They are of such great historical importance that the Fourth Amendment to the United States Constitution specifically addresses search warrants. Public policy favors searches pursuant to warrants issued by the court over warrantless searches and seizures by law enforcement because the warrant issuance process incorporates the checks and balances that are the foundation of our constitutional system of government. Warrants sought by the Executive Branch must be independently authorized by the Judicial Branch.

To what extent, and in what circumstances, should there be public access to and scrutiny of search warrants? Since the late 1980s, federal courts have struggled with the issue of access to search warrant materials from their issuance through the criminal trial process. Determining access to search warrant documents requires balancing competing interests of the government, the affected individuals, and the public during certain stages of the justice process. Federal courts, for the most part, have inadequately identified the competing interests and have failed to develop an appropriate framework for resolution of the access issue.
The following article describes the federal search warrant process, identifies and discusses the individual, governmental, and public interests at stake, and addresses how these interests are affected by the stages of the justice system. The article then sets forth an analysis of the circuit court access cases, discusses the procedural application of an "access test," and proposes a specific framework for an access test that meets the objectives of the justice system.

II. THE ISSUANCE OF A FEDERAL SEARCH WARRANT AND SEARCH WARRANT DOCUMENTS

A federal search warrant is issued upon establishment of probable cause that contraband, evidence of a crime, or the fruits of a crime may be located at a certain place.¹ The location must be described with particularity, as must the items to be seized.² The warrant may be issued by a federal magistrate, or in some instances, a state court judge.³ The warrant is issued either upon an affidavit sworn to before the issuing judge, or, in limited circumstances, based upon recorded oral testimony.⁴ Once issued, a search warrant must be executed within ten days.⁵

Typically, the documents associated with a federal search warrant consist of the warrant, an application for the warrant, a probable cause affidavit, the return, and an inventory. The warrant describes the property or place to be searched, the items to be seized, the date and time issued, and the issuing judicial officer. The application contains the same information as the warrant, along with either the statement of probable cause or the attached affidavit of probable cause. The application is signed by the probable cause affiant, typically a law enforcement officer, and by the issuing judicial officer before whom the basis for probable cause is sworn. The inventory is a listing of all items seized during the search. The return shows when the executing officer received the warrant, when the warrant was executed, and in whose presence the inventory was prepared.

Once executed, the warrant, return, and inventory are returned to the magistrate. A copy of the warrant and a receipt for the property seized are given to the person from whose premises or possession the property is taken, or may be left at the searched premises.⁶ After the magistrate receives the return and inventory, he or she is directed to file the warrant, return,

². U.S. CONST. amend. IV.
³. FED. R. CRIM. P. 41(b).
⁴. Id. 41(d).
⁵. Id. 41(e)(2)(A).
⁶. Id. 41(f)(3).
inventory, and "all other papers in connection therewith" with the clerk of court for the district in which the property was seized.\textsuperscript{7}

There is no requirement that an attorney for the government be included in the search warrant application, execution, or return process. Law enforcement officers typically make applications for search warrants directly to the issuing judicial officer. Furthermore, there is no requirement that the statements made in the affidavit set forth only evidence that would be admissible at trial. The rules of evidence do not apply,\textsuperscript{8} and the use of hearsay is common in applications. Because the affidavit is often prepared at the beginning of a law enforcement investigation, it may contain a broad spectrum of facts supporting probable cause, including investigators' opinions based on knowledge and experience, statements from confidential sources, and preliminary conclusions.

III. INTERESTS AT STAKE IN DETERMINING EXTENT AND SCOPE OF ACCESS TO SEARCH WARRANT MATERIALS

Different parties may request access to search warrant materials at various stages in the justice process. The government, the affected individual(s), and the public are all parties in interest. Courts typically apply "access tests" to weigh the competing interests of these parties. Among the factors considered are how documents are routinely filed with the court or the presumptive right of access to criminal trial proceedings and documents.\textsuperscript{9}

The criminal justice process, however, is not a static set of events across which the various interests can be balanced according to a single set of parameters. The various stages of the justice process include pre-indictment/investigation, indictment, post-indictment/pre-trial, trial, sentencing, post-conviction/rehabilitation, and release/monitoring. Interests must be evaluated according to the purpose of justice inherent within each of these stages. Few courts, however, have evaluated and defined the nature of these interests and what they mean in relation to the status or timing of a proceeding or document in the justice process. For example, courts have yet to state clearly the objectives of each interest in the pre-indictment stage and render an opinion based upon balancing these objectives according to their purposes at that point in the justice process.\textsuperscript{10}

In order to make a rational finding as to appropriate access to search warrant materials, it is important to discuss the overall nature of each interest and the inherent purpose of the stage in the criminal justice process.

\textsuperscript{7} Id. 41(i).
\textsuperscript{8} FED. R. EVID. 1101(d)(3).
\textsuperscript{9} See discussion infra Parts IV–V.
\textsuperscript{10} See discussion infra Parts IV–V.
A. What Is the Individual’s Interest?

The “individual’s interest” throughout the justice process is ordinarily attributed to the defendant. Many different individuals have interests relating to a particular case, including a victim, witness, juror, or the defendant’s family member or associate. The individual interest has two components: a property interest and a personal privacy interest. A property interest is simply the individual’s right to and ownership of physical property that may be part of a criminal action, for example, real or physical property seized pursuant to a search warrant. Personal privacy interests, however, are more complex as stated in the Justice Information Privacy Guideline. “Privacy” is described as the interrelated values, rights, and interests unique to individuals. Privacy interests come in a variety of flavors, including privacy of the person, privacy of personal behavior, privacy of personal communications, and privacy of personal data (information privacy).”

Information privacy is the individual interest at issue with respect to search warrant materials. This interest is described as when, how, to whom, and to what extent one shares personal information about oneself with the world at large. The concept of information privacy places a right with the individual to control how information about him is gathered and used by others. It is important to note, however, that such an information privacy right is not a constitutional right and does not receive constitutional protections. Rather, information privacy is an accepted concept inherent in what

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11. THE NAT’L CRIMINAL JUSTICE ASS’N, JUSTICE INFORMATION PRIVACY GUIDELINE 12 (Sept. 2002), available at http://www.ncja.org/pdf/privacyguideline.pdf. Privacy of the person relates to an assertion of one’s physical privacy. Privacy of personal behavior relates to one’s desire to keep his acts out of the public eye. Privacy of personal communications relates to the desire to keep conversations and written or electronic communications from public disclosure. Privacy of personal data, or information privacy, relates to keeping information about oneself from public disclosure. Id. at 13.

12. Id. at 12–13. “Personal information,” commonly used within the justice system, may include “[i]nformation relating to race, national or ethnic origin, religion, age, sex, sexual orientation, or marital or family status; [i]nformation relating to education, medical, psychiatric, psychological, criminal, financial, or employment history; [a]ny identifying number, symbol or other particular assigned to the individual; [n]ame, address, telephone number, fingerprints, blood type, or DNA.” Id. at 13 (citing the United States Federal Privacy Act of 1974, as amended, 5 U.S.C. § 552a (1999)). For a further detailed analysis of information privacy within the justice system, see id. at 12–20.


Although the United States Supreme Court has not recognized a “general right to privacy,” some aspects of privacy of the person are protected under the Fourth Amendment, and some aspects of privacy of personal behavior are protected as penumbra of fundamental rights outlined in the Constitution. See Paul v. Davis, 424 U.S. 693, 712–13 (1976) (explaining penumbra of constitutional rights); Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (explaining protection from unreasonable search and seizure under the Fourth Amendment); Katz v. United States, 389 U.S. 347, 350–51 (1967) (stating, “the protection of a person’s general
courts characterize as “an individual’s interest” in court documents, such as search warrant materials.14

B. What Is the Government’s Interest?

When courts discuss “the government’s interest” in search warrant materials, they generally refer to an investigative law enforcement interest.15

right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States”). In Paul, the Supreme Court stated that “[w]hile there is no ‘right of privacy’ found in any specific guarantee of the Constitution, the Court has recognized that ‘zones of privacy’ may be created by more specific constitutional guarantees and thereby impose limits upon government power.” Paul, 424 U.S. at 712–13 (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973) (noting personal privacy rights in the “zones of privacy” are those such as “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education”)): Id. at 713.

Where a person seeks to engage in confidential communication, the privacy of personal communications is recognized as part of the protection from unlawful searches and seizures provided by the Fourth Amendment. See Katz, 389 U.S. at 351 (finding that a person had an expectation of privacy in his conversation when such conversation took place within a telephone booth). Generally, however, privacy of one’s personal information and reputation or communications that a person does not seek to keep private have not been found to fall within the protection of the Fourth Amendment or the penumbra of constitutional rights described above. Id. Personal communications privacy, however, is recognized and protected to some extent under other forms of federal law. For example, certain communications are protected by statute, such as electronic wire communications. See 18 U.S.C. § 2511 (2002) (“Title III”) (interception and disclosure of wire, oral, or electronic communications prohibited absent court authorization). Additionally, some communications are protected through assertion of evidentiary privileges (for example, attorney/client, marital, psychotherapist/patient, clergy/penitent). FED. R. EVID. 501; see, e.g., Jaffee v. Redmond, 518 U.S. 1, 10–11 (1996) (psychotherapist/patient privilege); Upjohn v. United States, 449 U.S. 383, 389 (1985) (attorney/client privilege); Trammel v. United States, 445 U.S. 40, 43–44 (1980) (marital privilege); In re Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990) (clergy/communicant privilege); United States v. Dube, 820 F.2d 886, 889 (7th Cir. 1987) (clergy/penitent privilege).


14. See, e.g., Certain Interested Individuals, John Does I-V v. Pulitzer Publ’g Co., 895 F.2d 460, 463, 467 (8th Cir. 1990) (“Gunn II”) (noting the petitioner’s “individual interest” under Title III, and individual interest in non-disclosure of pre-indictment material); Application of Newsday, Inc., 895 F.2d 74, 79 (2d Cir. 1990) (noting that the “common law right of access is qualified by recognition of the privacy rights of the person whose intimate relations may thereby be disclosed”); Times Mirror Co. v. United States, 873 F.2d 1210, 1216 (9th Cir. 1989) (noting the “privacy interests of the individuals identified in the warrants and supporting affidavits”).
The government, however, is much broader than just law enforcement, including the judicial and legislative branches. It is not an entity unto itself seeking to make, interpret, and enforce the laws for its own benefit—the government is the embodiment of the public. Therefore, the government's true interest lies in the administration of justice through applying the rules and procedures of the justice system on behalf of the public.

When weighing the government's interest in the context of criminal search warrants, it is important to note that the government's interest is as strongly represented by a court's involvement in finding probable cause upon which to issue the search warrant as it is by a law enforcement agency's desire to conduct the search. It is important to keep these equal and competing interests in mind when using the term "government's interest" and balancing this interest against that of the individual and the public.

C. What Is the Public's Interest?

In order to discuss the "public's interest" it is important to first define "the public." Broadly stated, "the public" is everyone except the subject individual(s) and the government entities associated with the particular case at issue. This includes persons, various groups (business, educational, religious, etc.), other government entities, and the media. The segments that make up "the public" might not represent a consolidated interest—there may be a variety of interests at stake. For example, one interest may be to access government records in order to ferret out abuse or corruption in the system. This supports open access to information in the justice system. A competing interest may be to promote investigation by law enforcement to protect the public from criminal acts of individuals. This interest supports limited access to information in the justice system.

15. See Times Mirror, 873 F.2d at 1214-16 (explaining the importance of the government's search warrant and investigative process); In re Search Warrant for the Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp., 855 F.2d 569, 574 (8th Cir. 1988) ("Gunn I") (noting "[t]he government has demonstrated that restricting public access to these documents is necessitated by a compelling government interest—the ongoing investigation."). See infra notes 62, 64, 81 and accompanying text.

16. Federal Rule of Criminal Procedure 41 sets forth requirements for issuance of a search warrant. The Rule states that a search warrant is issued by the court after receiving an affidavit or other information "if there is probable cause to search for and seize a person or property under Rule 41(c)." FED. R. CRIM. P. 41(d)(1)(amended 2002).

17. This is the public interest as noted by Judge McMillan in Gunn I, 855 F.2d at 573 (stating, "public access to documents filed in support of search warrants . . . may operate as a curb on prosecutorial of judicial misconduct."). See infra note 62 and accompanying text.

18. This interest is espoused by Judge Bowman in his concurring opinion in Gunn I, 855 F.2d at 575 (noting, "the public interest in knowing facts produced by uncompromised investigation," the successful prosecution of wrongdoers, and fairness to innocent parties). See infra note 64 and accompanying text.
The public's interest weighed by courts in the balancing tests is asserted by the party opposing the government or opposing the individual. This party is usually the media asserting the public's interest as an access interest.\textsuperscript{19} This is true because the media makes its living on revealing information to the public. In certain contexts, however, access may not be what the other members of the public consider the "public's interest." Therefore, when balancing the public's interest, as asserted by the media, against the individual's interest and the government's interest, it is important to consider that the public's interest does not belong exclusively to the media and weigh the arguments accordingly.

IV. HOW DOES THE JUSTICE PROCESS AFFECT BALANCING INDIVIDUAL, GOVERNMENT, AND PUBLIC INTERESTS?

Access to justice information cannot be evaluated according to a static test because the time at which a party desires access to information significantly affects the balancing of an individual's interest, the government's interest, and the public's interest. The justice system is comprised of a series of separate, yet interrelated, stages taking place over time. The stages include pre-indictment/investigation, indictment, pre-trial/prosecution, sen-

tencing, post-conviction/rehabilitation, and monitoring/release. Various
government agencies are responsible for carrying out functions in each of
these stages. These government agencies would include law enforcement,
prosecution, defense, courts, corrections, probation and parole departments.
To discern correctly the government’s interest at any single stage, it is im-
portant to identify the government agencies at work at that stage, and their
purposes. Similarly, to discern an individual’s interest or the public’s inter-
est at any stage, it is important to identify the privacy/property interest at
stake and the composition of the public at that stage.

At issue in this article is access to search warrant documents. Therefore,
the analysis below considers search warrant materials, including affi-
davits, warrants, and returns, and assesses competing interests related to a
request for access to these materials pre-indictment, post-indictment, and
where no indictment is returned.

A. Pre-indictment Interests at Stake

Each individual, the government, and the public have an interest in
open access to search warrant material, as well as competing interests in
restricted access. The individual interests stem from property and personal
privacy interests. The government interests stem from differing aspects of
conducting an effective criminal investigation. The public interests relate to
oversight of governmental functions and preservation of personal liberties.

1. Individual

An individual’s interest includes a property interest and a privacy in-
terest. When a search warrant is executed by law enforcement, the individ-
ual’s property may be seized. The individual has an interest in the return of
that property. The property interest is addressed in the Federal Rules of
Criminal Procedure, which allow the individual to file a motion for the re-
turn of seized property.20

20. The Federal Rules of Criminal Procedure provide:
A person aggrieved by an unlawful search and seizure or by the deprivation of
property may move for the property’s return. The motion must be filed in the
district where the property was seized. The court must receive evidence on any
issue of fact necessary to decide the motion. If it grants the motion, the court
must return the property to the movant, but may impose reasonable conditions to
protect access to the property and its use in later proceedings.
FED. R. CRIM. P. 41(g) (amended 2002).

This section was formally FED. R. CRIM. P. 41(e). In the pre-indictment stage, courts
deriver on the standard to be followed when determining whether the individual has a right to
return of the property under investigation by a grand jury. Sometimes the individual must
show “irreparable injury,” whereas “[o]ther courts have refused to read an irreparable harm
requirement into the plain language of Rule 41(e).” In re Search Warrant Executed Feb. 1,
The more complex interest is the individual’s privacy interest in the information contained in the search warrant documents. Search warrant documents often contain personal information about the subject, as well as evidence of criminal acts described in support of probable cause for the search warrant. This information may be damaging to an individual’s reputation if released. Moreover, the right of the individual to have a fair trial may be adversely affected by the disclosure of search warrant information. For these reasons, an individual may seek to prevent the information from being released to the public.

In that case the petitioner argued that the “illegal seizures of his property and business records . . . damaged his reputation and thereby threatened his livelihood.” Id. The court found that he failed to demonstrate a “significant decline in revenues [or] an unwillingness of customers to conduct business with him” constituting irreparable injury. Id. The court chose not to interfere with the grand jury investigative process, holding that unless there was a showing of irreparable injury, the claim was better resolved in the form of a motion to suppress the evidence post-indictment. Id. The court noted that the property was business records and documents, a copy of which had been offered to the affected party. Id. In that circumstance, “a party can rarely, if ever, demonstrate that the seizure . . . caused irreparable harm.” Id.; accord, In re Search of Eyecare Physicians of Am., 910 F. Supp. 414, 420 (N.D. Ill.), aff’d 100 F.3d 514 (7th Cir. 1996).

In contrast, the District of Minnesota required no showing by the individual of any harm from the seizure of property. See In re Search of Up North Plastics, Inc., 940 F. Supp. 229, 233 (D. Minn. 1996). In Up North, the court required the disclosure of the search warrant documents solely on the petitioner’s need to challenge effectively the probable cause in the affidavit. Id. (finding that “[t]o permit an affidavit or any documents in support of a search warrant to remain sealed against examination by the person whose property was searched deprives him of the right secured by Rule 41 to challenge the search”). This holding allows for a challenge to the probable cause of the warrant prior to any formal charges being entered against the petitioner, in effect raising suppression issues before any criminal charges have been filed against the individual. In Up North, the court found that the government did not meet its burden of compelling need to seal the search warrant materials and rejected the notion of an ongoing grand jury investigation. Id. at 233–35; cf. Times Mirror, 873 F.2d at 1220 (finding that Rule 41 creates no new rights).

21. There may be more individuals who have a privacy concern than have a property concern. For example, in Gunn I the search warrant involved the secretarial area outside Gunn’s office at McDonnell Douglas Corporation (MDC). Gunn I, 855 F.2d at 570–71. As illustrated in Gunn II, Gunn, MDC, and four unidentified persons asserted privacy interest whereas, perhaps, only MDC had a property interest. Gunn II, 895 F.2d at 461.

22. See Cianci, 175 F. Supp. 2d at 202 (explaining that “[m]edia access also may be restricted in order to protect the defendant’s Sixth Amendment right to a fair trial”).

23. See, e.g., Gunn II, 895 F.2d at 467 (holding that privacy interests of affected parties justify continued closure of entire affidavit pre-indictment); In re Search of Office Suites for World and Islam Studies Enter., 925 F. Supp. at 739 (noting the subject individual’s opposition to unsealing the documents due to irreparable damage to his reputation caused by media accounts of his involvement in the investigation); In re Macon Tel. Publ’g Co., 900 F. Supp. at 492–93. “Any smear upon an innocent individual’s good name that would be caused by a release of information surrounding the execution of a search warrant will not be removed in the eyes of the public until such time as the grand jury refuses to return an indictment. Even then, character rehabilitation is much more difficult than denigration caused by revealing information relative to an investigation of that person.” Id.
In addition, the individual privacy interests of non-subjects are also implicated. It is not uncommon for affidavits to identify by name witnesses or persons who provided information to the government. Typically, the privacy interests of these persons is asserted by the government as part of the law enforcement investigative interest. Even in instances where the court grants access to warrant documents, names and personal information are almost always redacted to continue non-disclosure of cooperating witness identification.

Conversely, an individual may seek personal access to this information, to gain insight into the law enforcement investigation. In this case the information may be helpful to an individual in preparing to defend his case, or, in nefarious circumstances, evading the law or destroying further evidence of a crime. Therefore, the individual may seek access to the information pre-indictment.

24. See discussion infra notes 102 and 104.
26. Id. In this case, involving Richard Jewel and the Atlanta Olympic bombing, Jewel moved for disclosure of the search warrant materials. Id. at 1564. He was granted access to limited, redacted materials and was required to sign a non-disclosure agreement. Id. at 1565. Subsequently, the media sued for access to the search warrant materials. The court awarded access to the redacted materials, limiting the disclosure of witnesses and law enforcement tactics. Id. at 1571. In so doing, the court determined that the materials should be released because, in its view, the investigation of Mr. Jewel had been completed. Id.

Some articles cite a need to remedy personal inconvenience, a violation of a “dignitary interest,” or an inability to challenge the investigation of law enforcement as primary support for individual access pre-indictment. See David Horan, Breaking the Seal on White-Collar Criminal Search Warrant Materials, 28 PEPP. L. REV. 317, 336 (2001) (stating that a search in and of itself so violates a person’s “dignitary interest” that no post-search access to warrant material can restore the privacy interest upon which the search intruded); but see Peter G. Blumberg, Sunshine and Ill Wind: The Forecast for Public Access to Sealed Search Warrants, 41 DePAUL L. REV. 431, 471 (1992) (supporting public access and suggesting that an individual needs to show “intensified pain” from release of search warrant information in order to overcome the access interest). An individual’s inconvenience in being searched and his desire to know what law enforcement is investigating, however, does not support an information access right. There are no independent remedies for inconvenience or being a subject of an investigation at the pre-indictment stage of the justice process. Without a formal charge, there is not yet any suppression issue that necessitates looking at the basis for the probable cause search.

As in Up North, petitioners may guise a challenge to probable cause in a motion for return of property under Rule 41(g). See supra note 20. Additionally, where clearly abusive law enforcement tactics are employed in executing the search, the individual may have a claim for damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that “petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment”). See also In re Four Search Warrants, 945 F. Supp. at 1569 (noting that Richard Jewel originally requested access to the search warrant documents in order to file a Rule 41(g) motion for return of property or a civil claim for damages under Bivens). Such claims still do not support unfettered access to the information contained in the search warrant documents, given the government and the public’s interests at stake.
2. **Government**

The government agencies involved in pre-indictment search warrants are law enforcement agencies and the courts. Law enforcement seeks warrants as part of the investigatory process. The courts are responsible for assuring that probable cause exists to search the places described in the warrant. At this stage, the law enforcement interest is primarily in keeping search warrant information from disclosure. This interest is based on a number of factors.

First, law enforcement desires to protect the investigation. Search warrant materials often outline the procedures and tactics followed by law enforcement. Access to this information would allow subjects to flee the jurisdiction or to destroy pertinent evidence.

Second, search warrant materials often contain names and personal identifying information of witnesses or victims of a crime. Law enforcement has a responsibility to protect the personal privacy and physical security of these parties during the investigation.

Third, to be effective in performing its public service function, law enforcement may have a duty to protect the privacy interests of an individual who is the target of the search warrant. The search warrant is based on information obtained through initial investigation, which lends probable cause sufficient to further the investigation through a search. The search may not lead to indictment or formal charges. Therefore, in the pre-indictment stage, the target has a privacy interest in not having his or her name disclosed to the public in connection with a possible crime.

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27. The United States Constitution, amendment IV reads:

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

U.S. CONST. amend. IV.

The Federal Rules of Criminal Procedure 41(d)(1) states: "After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c)." FED. R. CRIM. P. 41(d)(1) (amended 2002) (emphasis added).

28. Many courts have cited this interest as a basis to justify continued closure. See discussion infra note 98 and accompanying text.

29. See discussion infra notes 102, 104, 137, 138 and accompanying text.

30. Law enforcement does not always follow this rule of protection. The results are evident in the case of the Maryland scientist who was identified as a "person of interest" by the United States Attorney General in the anthrax investigation. Press coverage of the search of his house and his girlfriend's residence lead to much embarrassment for the subject and possible witness and forced him to make a number of public statements to proclaim his innocence. The disclosure occurred pre-indictment. No formal charges had been brought, or have been brought to date. The scientist lost his employment and suffered great emotional stress as a result of law enforcement failing to protect his privacy interests during the investigation.
Finally, law enforcement bears a responsibility to the public to protect all of these interests by advocating non-disclosure of search warrant materials before formal charges are filed.

In contrast, the judiciary’s interest is one of neutrality and oversight. A court’s interest lies in protecting the target individual from law enforcement overreaching by ensuring that probable cause for the search exists. Some courts have expanded their pre-indictment interest to include promoting public access to search warrant materials. This is a controversial position for the courts to take. The court’s role in issuing search warrants serves to check the executive branch’s power. If the court performs this role correctly, there is no need for the court to grant further public oversight at this stage. If the court asserts public access, it may directly affect the target individual’s interest in non-disclosure. Courts’ practices at this stage of the justice process are not uniform from jurisdiction to jurisdiction.  

3. Public

The public’s interest is often claimed by the media, arguing for open access. This interest is based on accessing search warrant materials to prevent corruption in the system and abusive law enforcement tactics, or is otherwise based on general notions of self-governance. The public, however, has an equally valid interest in non-disclosure to enable investigation by law enforcement, to aid the successful prosecution of wrongdoers, to


31. See discussion infra Part VII.B. The Eastern District of Arkansas plays an active role in promoting public disclosure pre-indictment.
protect the privacy of individuals named in search warrant documents, and to prevent the spread of rumors based on preliminary information.\textsuperscript{32}

B. Balancing the Pre-Indictment Interests

The interests may be charted as follows:

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<thead>
<tr>
<th>Individual Interest</th>
<th>Government Interest</th>
<th>Public Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open Access</td>
<td>Ability to mount defense, thwart further investigation or flee</td>
<td>Ability to inform public of investigation progress</td>
</tr>
<tr>
<td>Closed No Access</td>
<td>Preserve reputation; Prevent embarrassment from public disclosure</td>
<td>Prevent exposure of investigation, target and techniques; Prevent injury to subject and witnesses</td>
</tr>
</tbody>
</table>

Each group has at least one interest that can be articulated for open access to search warrant materials or no access to search warrant materials. The interest that is more important to any group in a certain case will be the interest asserted in a challenge to the access process. Courts must balance the interests raised by each group. The balancing is often highly subjective at the pre-indictment stage of the justice process.\textsuperscript{33} In weighing the interests, courts must take into account the inherent goals of society and the checks and balances within the justice system.

The fundamental principle of our form of government is divided and shared powers and responsibilities. The executive branch has the power and responsibility to enforce laws. The judicial branch oversees the enforcement and, as it pertains to search warrants, must authorize their issuance and execution.\textsuperscript{34}

\textsuperscript{32} See Gunn II, 855 F.2d 460, 575 (8th Cir. 1990) (Bowman, J., concurring) (explaining the public’s interest in an uncompromised investigation and successful prosecution of those who committed crimes against the United States). Since the decision in Gunn II, the Middle District of Georgia has relied on this language in ruling to keep search warrant documents sealed in an ongoing investigation. See In re Macon Tel. Publ’g Co., 900 F. Supp. 489, 492–93 (1995).

\textsuperscript{33} See infra Part IV for a discussion of balancing these interests with the standard First Amendment and common law access tests employed by the courts to date.

\textsuperscript{34} U.S. CONST. amend. IV.
For example, one goal of society is to promote fair investigation. Another goal of society is to protect the privacy and physical security of cooperating witnesses, victims, law enforcement officers, and the investigative target. While it may promote an individual’s selfish interest, it does not promote society’s interest to allow an individual to access search warrant materials in order to conduct further crimes or to harm witnesses. Similarly, while some members of law enforcement may view it as a valid interest to publicize the scope and direction of an investigation, it is adverse to society’s interest to allow the government to use open access to search warrants where the consequence is defamation or embarassment of citizens. It is not a goal of society to allow for overreaching of law enforcement and intrusion of government upon citizens. It is not a goal of society to allow access to search warrant materials to hinder investigations, to create rumors, or to further public speculation. These are premises that should affect how courts balance the interests of each group.

Inherent checks within the justice system support these societal goals. First, the balance of powers between the executive and judicial branches is evident in the issuance of search warrants. At this stage the judiciary acts

35. Law enforcement can initiate a search and seizure without a warrant. In certain circumstances these searches are lawful, such as a search incident to arrest, a search under the threat of immediate destruction of evidence, a search pursuant to a “hot pursuit,” or a “stop and frisk.” See, e.g., N.Y. v. Belton, 453 U.S. 454, 459–61 (1981) (dealing with searches of areas within arrestee’s immediate control proper); Michigan v. DeFillippo, 443 U.S. 31, 35–36 (1979) (dealing with searches of individual incident to lawful arrest authorizes search); Terry v. Ohio, 392 U.S. 1, 30 (1968) (dealing with a reasonable suspicion person was engaged in wrongdoing, along with reasonable suspicion that he may be armed, as proper support for stop and frisk); Warden v. Hayden, 387 U.S. 294, 297–300 (1967) (dealing with pursuit of armed subject into a house and search thereof permitted); United States v. Delguyd, 542 F.2d 346, 351 (6th Cir. 1976) (discussing exigent circumstances necessary to justify a warrantless entry to an apartment where police concluded that evidence was being destroyed).

In other instances warrantless searches may be deemed unlawful, and courts will suppress the evidence post-indictment. See Mincey v. Arizona, 437 U.S. 385, 390 (1978) (finding no murder scene exception to warrant requirement; thus, four day warrantless search of apartment following a homicide was not justified). This post indictment suppression, however, does necessarily dissuade law enforcement from conducting warrantless searches. The courts encourage law enforcement to conduct searches pursuant to warrants by shifting the burden to the defendant to challenge a search done pursuant to a warrant. For example, case law supports reasonable law enforcement actions by providing a presumption of good faith in swearing a probable cause affidavit. See Franks v. Delaware, 438 U.S. 154, 171 (1978) (holding that there is a “presumption of validity with respect to the affidavit supporting [a] search warrant,” and inquiry into the veracity of the affiant’s statement requires that the defendant make a substantial preliminary showing that a “false statement [was made by the officer] knowingly and intentionally, or with reckless disregard for the truth”). Additionally, where an officer executes a warrant issued by the court, there is a presumption of “good faith execution” by the officer, even though the warrant may have been defective. See United States v. Leon, 468 U.S. 897, 922 (1984) (finding that, “[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in con-
as a proxy for the individual and the public by providing a check on the investigative powers of law enforcement. For example, the judiciary is required to find probable cause that there is evidence of a crime in the places to be searched. Further, a search warrant issued by the court is subjected to scrutiny down-the-line in the justice process. Abuses of discretion may result in suppression of the evidence or dismissal of the case.

Second, the grand jury protects the individual by acting as another fact-finding body between law enforcement investigation and official charges.

36. See In re Search of 1993 Jeep Grand Cherokee, Nos. 96-91M, 96-92M, 96-93M, 1996 WL 768293, at *8 (D. Del. Oct. 11, 1996), explaining that: [t]he purpose of having a ‘neutral and detached magistrate’ determine probable cause is to safeguard against a prosecutor’s overzealousness or bias from effecting [sic] his judgment, and insure that a disinterested party objectively reviews the government’s proffer of probable cause . . . . The judiciary’s role is to serve as a check upon corrupt law enforcement practices. Thus, a further check upon this procedure . . . is redundant and counterproductive.

37. FED. R. CRIM. P. 41(d)(1) (amended 2002). Probable cause, generally, is found “where facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged.” Dumbra v. United States, 268 U.S. 435, 441 (1925). In finding probable cause in a search warrant, an issuing judge is required to make “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). This is known as the “totality of the circumstances” test. Id. at 230–31.

38. Under the Federal Rules of Criminal Procedure, following arraignment, the defendant may move pre-trial to suppress evidence. FED. R. CRIM. P. 12(b)(3)(C) (amended 2002). The defendant may challenge the warrant on a number of grounds, including whether the warrant was issued on probable cause, is facially deficient and void, or whether the search exceeded the scope of the warrant. See generally Walden v. Carmack, 156 F.3d 861, 871–73 (8th Cir. 1998) (explaining the challenge of the search warrant based on lack of probable cause and execution beyond scope of the warrant). The issuing judge’s probable cause finding must comply with the “totality of the circumstances” test, and is reviewed by the district court according to whether the judge “had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” Gates, 462 U.S. at 238–39 (citing Jones v. United States, 362 U.S. 257, 271 (1960)).

39. The grand jury is empanelled to investigate criminal activity. It consists of up to 23 individuals and is charged with the responsibility of determining whether probable cause exists that a crime occurred and that the person being accused committed the charged offense. The grand jury is “not textually assigned . . . to any of the branches [of government],” United States v. Williams, 504 U.S. 36, 47 (1992), and stands between the accuser and the accused as “a primary security to the innocent against hasty, malicious[,] and oppressive persecution.” Woods v. Georgia, 370 U.S. 375, 390 (1962). See generally Mark Kadish, Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process, 24 FLA. ST. U. L. REV. 1 (1996) (advocating a balance between the efficiency of law enforcement and the secrecy of grand juries).

The Fifth Amendment provides, “[n]o person shall be held to answer for a capital,
The grand jury must find probable cause that a crime has been committed before it returns an indictment formally charging an individual. This fact-finding is done in a closed proceeding to protect the privacy interests of both the accused and the witnesses. Therefore, societal goals, in conjunction with inherent checks and balances of the justice system, provide a framework in which courts can balance competing access interests at the pre-indictment stage of the justice process. This framework alleviates the need to apply ridged access tests drawn from other stages in the justice process, such as a First Amendment test.

C. Down the Line in the Justice Process

Following the pre-indictment stage, a case can have two different paths, depending upon whether an indictment is entered. What are the interests of the individual, government, and public in access to search warrant materials in these different situations?

1. Post-Indictment/Trial

If criminal charges are filed, new interests and rights of the parties attach. At this stage the defendant has been charged with a crime and his or her interest in defending against this charge is substantial. The information contained in the search warrant, affidavit, and return is key to seeking the suppression of evidence and is provided by the government as part of routine discovery under the Federal Rules of Criminal Procedure. The public

or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. The Fifth Amendment has been construed to apply only to felony offenses. See 18 U.S.C. § 4083 (2000); Mackin v. United States, 117 U.S. 348, 354-55 (1886). In order for a charge to be valid, there must be concurrence between the grand jury and the prosecuting authority. See United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965).

An alternative to being charged by a grand jury’s return of indictment is the swearing of a criminal complaint by the prosecutor. Under Federal Rules of Criminal Procedure 3, a “complaint is a written statement of the essential facts constituting the offense charged” that must be given under oath before an authorized judge. FED. R. CRIM. P. 3 (amended 2002). Before the complaint can be used to arrest an individual, a judge must issue an arrest warrant or summons for that individual. In so doing, Federal Rules of Criminal Procedure 4 requires the judge to find that the documents submitted by the government “establish probable cause to believe that an offense has been committed and that the defendant committed it.” FED. R. CRIM. P. 4 (amended 2002). Even if an individual is arrested on the complaint and warrant, in order for the government to continue with the prosecution, the matter must be presented to the grand jury if it involves a felony offense. U.S. CONST. amend. V.

40. See discussion infra Part IV.

41. Search warrants and affidavits are produced, generally, under Federal Rules of Criminal Procedure 16(a)(1)(E), requiring the government to produce for inspection or copying all documents and tangible items it intends to use in its case in chief or that are material to preparing the defense. FED. R. CRIM. P. 16(a)(1)(E) (amended 2002); see also Id. 12(b)(4)(B) (amended 2002) (defendant may demand notice of intent to use evidence that
may also request search warrant information post-indictment. Public disclosure, however, may raise a Sixth Amendment issue regarding the defendant's right to a fair trial. In determining access, the courts must engage in balancing the three interests at this stage as well.

Additionally, justice information in the trial stage is often requested by the public under a qualified First Amendment right to access criminal trials, pursuant to which courts can deny access if they find that the government has a compelling interest and the denial of access is narrowly tailored to serve that interest. Although the Supreme Court has not extended this First Amendment qualified right of access to the right to review documents in criminal matters, circuit courts have applied the qualified right of access in this manner. A right of access to post indictment judicial records, although not absolute, is also afforded by a common-law right of access.

42. United States v. Cianci, 175 F. Supp. 2d 194, 198–99 (D. R.I. 2001), explaining that although the government raises no objection to the disclosure of the search warrant materials, [t]he defendants continue to object to the Journal's motion claiming that the affidavit is replete with unsubstantiated opinions, hearsay, and partisan commentary. They argue that any "right" of access the Journal may have is outweighed by the likelihood that publication of the affidavit will prejudice their Sixth Amendment right to a fair trial. Id. The court held that the right to a fair trial outweighed the right to pre-trial access to the search documents and that the alternative of delaying release until after trial commenced was appropriate. Id.

43. In Cianci, the court weighed the competing interests of the individual, the government, and the public in deciding whether disclosure of the search warrant affidavits would compromise the defendant's right to a fair trial. Id. at 202–04. A number of factors unique to search warrant affidavits are taken into consideration, including: (1) the purpose of the affidavit—to persuade the court that the subject has committed a crime and should be further investigated; (2) the fact that affidavits are not prepared by attorneys and are not subject to the rules barring attorneys from making public statements that may prejudice the defendant's trial; (3) the notion that the affidavit is not restricted to facts, but may contain opinions, conclusions, and information on tangential matters; (4) the fact that affidavits often contain hearsay; (5) the ability to file the documents ex parte, affording the defendant no opportunity to challenge their contents. Id.


2. *No Indictment*

In some cases, the prosecutor may not seek or the grand jury may not return an indictment. This can result from mootness of the case, due to the death of the defendant, the expiration of the statute of limitations, or the granting of immunity to the subject. It may also result because of insufficient evidence to charge a particular target or the grand jury’s decision not to indict. In these situations, the interests of the three groups remain but may vary in importance. For example, the government may have no ongoing related criminal investigation. Therefore, non-disclosure of the search warrant documents may no longer be an important law enforcement interest. On the other hand, the documents may contain witness names and law enforcement procedures that the government has an interest in preserving or information pertinent to investigation of another individual. In these situations the government may seek to maintain the sealing of these documents.

Similarly, the target or another affected individual has an ongoing privacy interest in the information contained in the search warrant documents. He or she may seek to keep this information from public disclosure. In the case where the target or affected individual is deceased, however, his or her individual interest may no longer exist.

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47. The statute of limitations is the period of time in which the government is permitted to bring charges. *Webster's Third New International Dictionary*, 2231 (1986). Generally, the statute of limitations is five years although there are special rules extending limitations for certain types of offenses. See 18 U.S.C. § 3282–96. (2002). There is no statute of limitations for a capital case. Id. § 3281 (2002).

48. Only the Executive branch has authority to grant immunity from prosecution. See *In re Perlin*, 589 F.2d 260, 269 (7th Cir. 1978) (stating that the court’s function in reviewing government’s request is ministerial); *In re Kilgo*, 484 F.2d 1215, 1219 (4th Cir. 1973) (indicating that the sole function of the court is to ascertain whether there is compliance with the statute). A grant of immunity is one form of plea bargaining and is provided for by statute. See 18 U.S.C. §§ 6001–05 (2002).

49. *See Application of Newsday Inc.*, 895 F.2d 74, 75 (2d Cir. 1990) (explaining that the government asserted no ongoing investigation or interest in keeping the search warrant material closed, and it withdrew its objection to unsealing portions of the search warrant affidavit).

50. *See In re Four Search Warrants*, 945 F. Supp. 1563, 1569 (N.D. Ga. 1996) (holding that it is appropriate to keep details of a bomb device under seal to aid the government in assessing credibility of subsequent information and to promote a compelling interest in the identification and prosecution of an actual perpetrator).

51. *See Gunn II*, 895 F.2d 460, 466 (8th Cir. 1990).

52. The issue of whether an affected person’s privacy interest in search warrant materials survives his death has not been specifically addressed. The Supreme Court, however, has
The public’s interest may also assume a variety of forms, including need for law enforcement accountability, desire for access in order to resolve curiosity, or no interest in the search warrant documents at all.

In balancing these interests, the court must determine how the justice landscape has changed given that there is no continuing investigation and no criminal charges will be filed. Many courts find that the disclosure interest, whether to the target individual or the public, is the most salient at this time in the justice process.53

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53. See In re Search Warrant Executed Feb. 1, 1995, No. M18-65 (RJW), 1995 WL 406276 at *3 (S.D.N.Y. July 7, 1995) (quoting In re Searches of Semtex Indus. Corp., 876 F. Supp. 426, 431 (E.D.N.Y. 1995)) (noting that disclosure to the subject “should not be postponed indefinitely” where the grand jury has not returned an indictment in a reasonable time). The Southern District of Ohio considered two different interests in a case that had been concluded through a plea agreement. See In re Search Warrant, No. M-3-94-80, 1996 WL 1609166, at *3–5 (S.D. Ohio Aug. 20, 1996). In this case the subject of the search warrant argued for continued closure after entering a guilty plea. Id. at 3. He specifically sought to have information contained in the search warrant documents that did not relate to his plea remain sealed, noting that he was not charged with these accusations, and they should not be tried in the “court of public opinion.” Id. The court rejected this argument, finding that the disclosure did not affect any Sixth Amendment right of petitioner and that his interest in reputational harm did not outweigh the public’s interest in disclosure. Id. In addition, the petitioner argued that names and identifying information of other individuals contained in the search warrant documents should remain sealed. Id. The court found that the rights of inno-
V. CIRCUIT COURT TESTS FOR ACCESS TO SEARCH WARRANT MATERIALS

Given the fluidity of the justice system and varying interests at each stage of the justice process, the blanket application of static access tests fails to balance adequately the individual, government, and public interests with societal goals. As seen in the review of circuit and district court decisions below, however, courts continue to ignore the nuances of the justice process and seek to apply ridged access procedures based on First Amendment or common law access tests drawn from post-indictment stages of the justice process.

Since the late 1980s, public and individual access to search warrant documents filed with the court pre-indictment has been the subject of various circuit court opinions. Widespread consideration of this issue began in 1988, when the United States Department of Justice initiated a nationwide investigation of defense contract fraud. In June 1988 the Federal Bureau of Investigation and the Naval Investigative Services executed more than forty search warrants at various locations around the country, including the Eastern District of Missouri (St. Louis), the Southern and Central Districts of California (San Diego and Los Angeles, respectively), and the Eastern District of New York (Brooklyn). Requests by media organizations for access to the search warrant documents in these districts led to four court of appeals decisions regarding access to search warrant material. The circuit decisions are not consistent, and have generated confusion that continues to this day.

A. Gunn I

The first of these decisions was In re Search Warrant for the Secretarial Area Outside Office of Gunn ("Gunn I"). Following the execution of two warrants at McDonnell Douglas Corporation (MDC), the government filed, unsealed, the search warrant for the secretarial area, the description of the property to be seized, and the receipt for the property actually seized. The government filed a motion to seal the search warrant for Gunn's office, the affidavits for the search warrants, and all other material. The court granted the motion. Later, Pulitzer Publishing Company, publisher of the St. Louis Dispatch, filed a motion seeking access to the sealed material. The district court determined that there was both a First Amendment right of access to the material and a common law right of access, although neither right was absolute. The court unsealed certain portions where the government did not oppose access, but denied the request to unseal the remaining third parties may overcome the presumption of the public's right to access, where the information was not already public. Id. Such names were ordered redacted from the materials. Id.
portions, finding that continued closure was necessary to maintain integrity of the government’s investigation.\(^5\) No charges had been brought against any defendant at the time.

In a split decision, two of the three appellate judges determined that a First Amendment right of access to search warrant documents existed,\(^5\) but that the right was qualified and closure warranted if “closure is essential to preserve higher values and is narrowly tailored to that interest.”\(^5\) Two judges also determined that access to the material in this instance was not warranted because the government’s investigation was ongoing, and the government had a legitimate interest in maintaining the integrity of the investigation.\(^5\) To understand the holding, and how each of the judges arrived at his conclusions, requires further inspection.

Judge McMillan wrote the opinion for the court. Working from United States Supreme Court cases, Judge McMillan noted that the First Amendment protects a right of the public and the press to attend criminal trials and pre-trial hearings.\(^5\) Further, the determination as to whether a First Amendment right of access extends to a particular proceeding called for an examination of “whether the place and process have historically been open to the press and general public[,] and whether public access plays a significant positive role in the functioning of the particular process in question.”\(^6\) This is referred to throughout case law as the “First Amendment test.”

Judge McMillan applied the First Amendment test to reach a novel conclusion. He correctly noted that search warrants are issued in an ex parte closed proceeding and that to do otherwise would frustrate the very objective of the search warrant process. He concluded, however, that the complainant, Pulitzer Publishing, did not want access to the issuing process, but

\(^5\) Id. at 571.
\(^6\) Id. at 575–76. Judges McMillan and Heaney. The third judge, Judge Bowman, found it unnecessary to reach the First Amendment issue. \(\text{id.}\)
\(^7\) Id. at 574 (quoting In re N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987)).
\(^8\) Id. at 574–75. Judges McMillan and Bowman. \(\text{id.}\) Judge Heaney dissented as to continued closure. In his view the governmental interest in its ongoing investigation was minimal. According to him, the subjects probably already knew of the nature and scope of the investigation. In addition, there had already been disclosure of information from other sources, and the interest of the taxpayers to know of the investigative details outweighed any interest in closure because the investigation involved allegations of procurement fraud in the defense industry. As he put it,

Id. at 576 (Heaney, J., concurring and dissenting).

\(^9\) See id. at 573 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (discussing the right to attend criminal trials); Press-Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986) ("Press-Enterprise II") (discussing access to pre-trial hearings)).
\(^10\) Gunn I, 855 F.2d at 573 (citing Press-Enterprise II, 478 U.S. at 8).
to the documents utilized in that process. Judge McMillan distinguished between the process and the documents and found that a First Amendment right exists to access the documents, because the documents were filed with the clerk of the court and were filed without being sealed. In reaching his conclusion, Judge McMillan noted that the Supreme Court has never addressed the issue of a First Amendment right of access to judicial documents, citing *Nixon v. Warner Communications, Inc.*, 61 to support the proposition that judicial records historically have been open to public inspection.

As to the second prong of the First Amendment test, Judge McMillan concluded that access to the documents was important to the public's understanding of the function and operation of the judicial process and the criminal justice system. He also found that access was important to curb prosecutorial or judicial misconduct. 62

Notwithstanding that Judge McMillan found a First Amendment right of access, he concluded that the search documents should remain sealed in their entirety. He found that the government had a compelling interest in the ongoing investigation that overrode the public's access interest. He noted that the documents described the investigation in considerable detail, included information obtained by wiretaps and from informants, and revealed the nature, scope and direction of the investigation. Thus, he concluded that "[t]here is substantial probability that the ... investigation would be severely compromised if the sealed documents were released." 63

Judge Heaney agreed with Judge McMillan regarding the existence of a First Amendment right; however, he viewed the government interest in maintaining closure as minimal. As Judge Heaney saw it, the subjects of the investigation likely already knew of the investigation and only the general public remained uninformed. Because the allegations involved a serious matter of public concern, the public was "entitled to know the full details of the [investigation] as soon as possible in order to intelligently act on the matter." 64

Finally, Judge Bowman, though rejecting the application of the First Amendment test, sided with Judge McMillan regarding the overwhelming governmental interest in continued closure. To him it was significant that

61. 435 U.S. 589 (1978). In *Nixon*, however, the Supreme Court applied only a common law right of access to documents admitted as evidence in a criminal trial. *Id.* at 597–98. In *Nixon*, the news media sought copies of tape recordings that had been admitted as exhibits in a criminal trial. The district court denied the media the right to have their own copies, and they appealed. The Supreme Court upheld the denial of copies and in so doing analyzed the case under common law doctrine. *Id.* at 598–99.
62. *Gunn I*, 855 F.2d at 573.
63. *Id.* at 574.
64. *Id.* at 576 (Heaney, J., concurring and dissenting).
the matter was addressed prior to any charges being filed. He also acknowledged the public interest in knowing facts produced by an uncompromised investigation, the public interest in the successful prosecution of anyone who had defrauded the government, and the public interest in fairness to any innocent persons who were linked to the investigation in the search warrant documents. To Judge Bowman the justification for continued closure was so overwhelming regardless of the applicable standard that it made it unnecessary to address the constitutional issue of whether a First Amendment right existed.

B. Gunn II

Following the decision in Gunn I, Pulitzer Publishing renewed its motion for access, and the government withdrew its objection to release of the documents. The district court redacted certain portions of the search warrant materials and ordered them released. MDC, Gunn, and several unidentified individuals intervened and appealed the disclosure. Pulitzer Publishing cross-appealed the court’s refusal to release the entirety of the documents. The case went to the United States Court of Appeals for the Eighth Circuit styled as Certain Interested Individuals, John Does I-V v. Pulitzer Publishing Co. ("Gunn II").

Judge McMillan again wrote the opinion, this time for a unanimous court. Even though no indictments had been returned, the government’s interest in continued closure no longer existed because, according to the government, its investigative objectives had been achieved. Gunn, MDC, and the unidentified individuals claimed that they had a constitutional right to privacy that outweighed any qualified right of access. The court agreed noting that "the procedural process of the government’s criminal investigation must be considered in the balancing process and that the absence of an indictment weighs heavily in favor of the privacy interests and non-disclosure." Indeed, the absence of an indictment was dispositive:

[w]here no indictments have issued against persons . . . there is a clear suggestion that, whatever their truth, the Government cannot prove these allegations. The court of public opinion is not the place to seek to prove them. If the Government has such proof, it should be submitted to a grand jury, an institution developed to protect all citizens from unfounded charges.

65. Id. at 575 (Bowman, J., concurring).
66. 895 F.2d 460 (8th Cir. 1990).
67. Id. at 466.
68. Id. (quoting United States v. Ferie, 563 F. Supp. 252, 254 (D. R.I. 1983)).
Because the warrant material could seriously damage the reputation of the named individuals and leave them no forum in which they could seek possible vindication, the court found that not even the release of a redacted version of the material was warranted. 69

C. *Times Mirror, Baltimore Sun, and Application of Newsday, Inc.*

No other circuit court has agreed with *Gunn I* in finding a First Amendment right of access to search warrant material. Two circuits have specifically rejected the existence of a First Amendment right, and one circuit has found it unnecessary to address the access issue under a constitutional analysis.

The two circuit cases rejecting the First Amendment right were decided between the decisions in *Gunn I* and *Gunn II*; *Times Mirror Co. v. United States*, 70 and *Baltimore Sun Co. v. Goetz*. 71

In *Times Mirror*, the United States Court of Appeals for the Ninth Circuit was presented with essentially the same issue the Eighth Circuit considered in *Gunn I*. The news media sought access to search warrant material concerning the defense contractor fraud scheme that was the subject of *Gunn I* and *Gunn II*. Access was sought with regard to warrants that had been issued in San Diego and Los Angeles. The cases were consolidated for appeal. In each case the government initially obtained an order sealing the warrant material. In the San Diego case, the magistrate denied the request to unseal the material, and the district court affirmed on appeal. In the Los Angeles case, the magistrate granted the request to unseal. The government obtained a stay pending appeal to the district court, which reversed the magistrate. 72 Thus, each matter before the Ninth Circuit Court of Appeals was one in which the news media was seeking to overturn a district court ruling. As in *Gunn I* and *Gunn II*, the request for access pre-dated the filing of charges against any person or entity.

The *Times Mirror* court rejected both the existence of a First Amendment right and access as a common law right and criticized the holding of *Gunn I*. As to the First Amendment, the court followed the same test that the Eighth Circuit utilized—whether the process was open historically and

69. Pursuant to a First Amendment analysis, the restriction to access must be narrowly tailored to address the closure interest. In *Gunn I*, the court concluded that no amount of redaction could be tailored to allow release of a portion of the documents while preserving the government’s compelling interest in protecting the integrity of its investigation. *See Gunn I*, 855 F.2d at 574. Similarly, the court in *Gunn II*, 895 F.2d at 466, found redaction would not adequately protect the privacy interests asserted.

70. 873 F.2d 1210 (9th Cir. 1989).

71. 886 F.2d 60 (4th Cir. 1989).

whether public access would play a "significant positive role in the functioning of the ... process."\textsuperscript{73} Like the Eighth Circuit, the court acknowledged that, historically, the warrant issuing process was secret. Unlike the Eighth Circuit, however, the court rejected the notion that there was a meaningful distinction between the process of issuing the warrant and the documents. The court noted that access to warrant material was routinely restricted upon government request with the courts being highly deferential to the government's determination that an investigation required secrecy.\textsuperscript{74}

As to whether public access would play a significant role, the court rejected the media's argument that access would promote self-governance through discussion and a check on potential government abuses, promote integrity of the criminal process, and serve the same therapeutic value as open criminal trials. The court found the argument unpersuasive because the assertions are true of every judicial process.\textsuperscript{75} Instead the court concluded that access would hinder the process by risking (1) the destruction of evidence; (2) flight of a criminal suspect; (3) obstruction of justice; and (4) coordination of false stories.\textsuperscript{76} In supporting its conclusion, the court compared the investigative process to the grand jury policy of secrecy, stating:

\begin{quote}
[i]f proceedings before and related to evidence presented to a grand jury . . . 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.\textsuperscript{77}
\end{quote}

The court concluded that the First Amendment provided no qualified right of access to warrant proceedings and materials.

The court also concluded that there was no common law right of access when "there is neither a history of access nor an important public need justifying access."\textsuperscript{78} Thus, for access to be granted, the party seeking access had to make a threshold showing that disclosure would serve the ends of justice.\textsuperscript{79}

The court also addressed the privacy issues unaddressed by \textit{Gunn I}.\textsuperscript{80} As the Ninth Circuit reasoned, the privacy interests compelled the same

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{73} \textit{Times Mirror}, 873 F.2d at 1213 (quoting \textit{Press-Enterprise II}, 478 U.S. 1, 8 (1986)).
\item \textsuperscript{74} \textit{Id}. at 1214.
\item \textsuperscript{75} \textit{Id}.
\item \textsuperscript{76} \textit{Id}. at 1215.
\item \textsuperscript{77} \textit{Id}. at 1215-16 (quoting \textit{In re Sealed Search Warrants and Affidavits}, Criminal No. H-88-0427, oral opinion at 12–13 (D. Md. Aug. 30, 1988)).
\item \textsuperscript{78} \textit{Id}. at 1219.
\item \textsuperscript{79} \textit{Times Mirror}, 873 F.2d at 1219.
\item \textsuperscript{80} In \textit{Gunn II}, 895 F.2d 460, 462 (8th Cir. 1990), the Eighth Circuit noted the \textit{Times Mirror} decision and its disagreement with \textit{Gunn I}. Whether the discussion of privacy issues in \textit{Times Mirror} influenced the decision in \textit{Gunn II} that privacy interests justified continued
\end{itemize}
\end{footnotes}
conclusion. Part of the policy behind grand jury secrecy was to protect the innocent accused from disclosure to the public that he or she was under investigation. Similarly, privacy interests had been the dispositive reason for closure of some judicial documents following the indictment of at least one person, such as bills of particular naming unindicted co-conspirators. 81

The Ninth Circuit found the reasoning in Gunn I fundamentally flawed. In particular, the Ninth Circuit criticized the claimed distinction between the issuing process and the documents, noting "[t]he warrant process—which Judge McMillan acknowledges 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, since in either case disclosure could frustrate the government's efforts to investigate criminal activity.

Moreover, Times Mirror criticized the Eighth Circuit's notion that because the search warrant materials may become the subject of a pre-trial suppression motion, a right to public access existed. The Ninth Circuit noted that,

[w]hile warrant material may, in due course, be disclosed to a defendant so she can challenge the constitutionality of the search at a suppression hearing at which the public has a First Amendment right of access, it does not follow that the public should necessarily have access to the information before that time. 83

As the Ninth Circuit so aptly observed, the same notion could be advanced regarding evidence presented to a grand jury, yet there is unequivocally no right of access to that material. 84

Also after Gunn I but before Gunn II, the United States Court of Appeals for the Fourth Circuit rejected a First Amendment right of access argument in Baltimore Sun Co. v. Goetz. 85 In Baltimore Sun, the underlying investigation concerned allegations of organized crime involvement in the health care industry. Again, the matter arose as a result of a news media request after the execution of a search warrant but prior to the filing of formal charges. The warrant itself and the return inventory had been unsealed, so the remaining question concerned the affidavit in support of the search warrant. The district court had denied the request on the basis that the public's interest in effective criminal investigation outweighed the news media's interest to access.

81. Times Mirror, 873 F.2d at 1217.
82. Id.
83. Id. at 1217–18 (emphasis added).
84. Id. at 1218 n.10.
85. 886 F.2d 60 (4th Cir. 1989).
The Fourth Circuit disposed of the First Amendment issue quickly, finding "[t]he Sun's claim of a [F]irst [A]mendment right of access to the affidavit fails because it does not satisfy the first prong of the test," or whether the place and the process historically have been open to the press.\textsuperscript{86}

On the other hand, for the general public the Fourth Circuit found a clear common law right of access. The qualified common law right was committed to the sound discretion of the issuing judicial officer and reviewed on appeal for abuse of discretion.\textsuperscript{87} The Fourth Circuit noted the important distinction stating:

\begin{quote}
[t]he distinction between the rights afforded by the first amendment and those afforded by the common law is significant. A first amendment right of access can be denied only by proof of a 'compelling governmental interest' and proof that the denial is 'narrowly tailored to serve that interest.' In contrast, under the common law the decision to grant or deny access is 'left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'\textsuperscript{88}
\end{quote}

Notwithstanding this distinction, the court created confusion by holding that a judicial officer may only deny access "when sealing is essential to preserve higher values and is narrowly tailored to serve that interest"\textsuperscript{89}—essentially a First Amendment standard for determining access.\textsuperscript{90}

The final decision was that of the United States Court of Appeals for the Second Circuit in \textit{In re Application of Newsday, Inc.}\textsuperscript{91} The warrant at issue was, again, arising from a news media request for access to search warrant materials in the defense contract fraud investigation addressed in \textit{Gunn I} and \textit{Times Mirror}. Procedurally, however, \textit{Newsday} was quite different. The defendant in \textit{Newsday} had already pleaded guilty, and the government did not oppose disclosure of the warrant material. The defendant opposed disclosure and the district court agreed to release redacted documents, removing references to third parties not subject to criminal investigation. The defendant appealed, but Newsday did not.

The court took the same approach as Judge Bowman in his concurring opinion in \textit{Gunn I}, finding that since the matter could be adequately ad-

\begin{footnotes}
\item[86] Id. at 64.
\item[87] Id. at 65.
\item[88] Id. at 64 (internal citations omitted).
\item[90] By the time the appeal was heard several indictments had been issued and the affidavit had been unsealed. \textit{Baltimore Sun}, 886 F.2d at 63. Thus, there was no need for the court to discuss privacy interests and it did not do so. Id.
\item[91] 895 F.2d 74 (2d Cir. 1990).
\end{footnotes}
dressed without reaching the constitutional question of whether a First Amendment right of access existed, the court should not reach that issue. The court found that access was warranted under a common law right where "the warrant has been executed, a plea-bargain agreement has been reached, the government admits that its need for secrecy is over, and the time has arrived for filing the application with the clerk."\(^2\) The court also found that the common law right of access was qualified by privacy interests of the persons affected, but that the lower court had adequately taken those interests into account by redacting sensitive material.\(^3\)

By 1990 three circuits had rendered opinions on access to search warrant material, but no other circuits have addressed this issue to date. The conflict still remains between application of the First Amendment test, the common law access test, and the need to apply either of these tests in determining pre-indictment access to such materials.

VI. THE DISTRICT COURTS WADE INTO THE CONFUSION

In those circuits where the Courts of Appeals have not addressed the question, none of the district courts have adopted a First Amendment analysis for access to search warrant material. Some have reserved ruling on the First Amendment,\(^4\) while others have specifically rejected it.\(^5\) Most of the

\(^{92}\) Id. at 79.

\(^{93}\) Id. A primary argument in Newsday focused on the inclusion of information obtained through wiretaps in the warrant documents. Id. The court rejected the defendant's argument that the wiretap statute prohibited disclosure of the warrant documents. Id. Instead, the court viewed the inclusion of such material as a fact that required careful review by the judge before releasing the materials. Id.


\(^{95}\) In re Macon Tel. Publ'g. Co., 900 F. Supp. 489, 491–92 (M.D. Ga. 1995): Certain things are kept quiet, and usually for good reasons. We do not allow the public access to jury deliberations (jurors would not be as willing to speak their minds, hence litigants would be deprived of a fair trial); the public may be barred from juvenile matters (transgressions of youth should not be publicized, and thus follow us for the remainder of our days); nor is the public allowed access to the grand jury (compromise of the cornerstone of the American criminal justice system). The inherent nature in the last of these examples . . . simply precludes the extension of First Amendment rights to public access in every instance. The very nature of the grand jury proceeding, and investigative proceedings generally, is secretive. To compromise that aspect of the object is to destroy the thing itself. The court refuses to find the existence of a right that would in some circumstances possibly destroy institutions . . . so valuable and necessary to society.

district courts have employed the general common law formulation in *Baltimore Sun v. Goetz*: the determination of whether access should be permitted requires balancing of the respective rights and is committed to the sound discretion of the trial court or issuing judge.96

Like *Baltimore Sun*, some of the courts have intermingled the constitutional standard appropriate for the First Amendment with the common law test by requiring that the party seeking closure demonstrate a compelling reason for closure.97 Or, as stated in *Baltimore Sun*, "access [may be denied] when . . . [it] is 'essential to preserve higher values and is narrowly tailored to serve that interest.'"98

In nearly every instance, access to search warrant materials is denied when there is an ongoing investigation and no charges have been brought. The justification for denial, or the interests that outweigh the presumptive right of access, have included potential compromise of the ongoing investigation,99 public interest in a full and complete factual basis for investiga-
tion,\textsuperscript{100} the public interest in the successful prosecution of those who commit crimes,\textsuperscript{101} preservation of grand jury secrecy,\textsuperscript{102} protection of government informants,\textsuperscript{103} the Sixth Amendment right of an accused to a fair trial,\textsuperscript{104} and the privacy interests of either a subject or a third party.\textsuperscript{105}

VII. THE INADEQUACY OF \textit{Gunn I}, \textit{Times Mirror}, AND \textit{Baltimore Sun}

Each of the circuit court cases addressing pre-indictment access to search warrant materials is flawed in its analysis: \textit{Gunn I}'s flaw lies in distinguishing between the "warrant issuing process" and the "documents" created; \textit{Times Mirror}'s flaw lies in failing to distinguish between the existence of a qualified right of access and the test to see whether that qualified right prevails in a specific context; and \textit{Baltimore Sun}'s flaw lies in blending a First Amendment standard with common law access test.\textsuperscript{106}

A. Issuing Process Versus Documents

\textit{Gunn I} found the existence of a First Amendment right by concluding that documents which are filed with the court are, and historically have been, open to the public.\textsuperscript{107} Thus, according to \textit{Gunn I}, even though the process of issuing those documents is, and historically has been, closed, the

\begin{itemize}
\item \textsuperscript{100} Sealed Search Warrants, 1999 WL 1455215, at *6-7; In re Macon Tel. Publ'g Co., 900 F. Supp. at 493.
\item \textsuperscript{101} In re Four Search Warrants, 945 F. Supp. at 1570; In re Macon Tel. Publ'g Co., 900 F. Supp. at 493.
\item \textsuperscript{103} In re Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp., in El Paso, Tex., 971 F. Supp. at 253; In re Four Search Warrants, 945 F. Supp. at 1570-71; In re Search of Office Suites for World and Islam Studies Enter., 925 F. Supp. at 743.
\item \textsuperscript{104} Cianci, 175 F. Supp. 2d at 202; contra, In re Search of Office Suites for World and Islam Studies Enter., 925 F. Supp. at 743 n.4.
\item \textsuperscript{106} In re Application of Newsday, Inc., 895 F.2d 74 (2d Cir. 1990), has perhaps the most accurate analysis. \textit{Newsday} involved access following a guilty plea by the principal subject, however, rather than access in a pre-indictment context by an affected party or the public. \textit{Id.}
\item \textsuperscript{107} See supra notes 59-60 and accompanying text.
\end{itemize}
"historically open access" prong for finding the existence of a First Amendment right was satisfied.108

The document/process distinction is meaningless and indefensible. Pursuant to Rule 41 of the Federal Rules of Criminal Procedure, the entire basis for issuance of the warrant must be contained in the papers or recorded by the court. It is rare that the issuance of a search warrant involves recorded oral testimony. More commonly the judge reviews the warrant, the application, and the probable cause affidavit and renders a decision based on the information included in these written instruments. The filing and review of the documents is essentially the "process" in issuing search warrants.

Moreover, adherence to the document/process distinction has resulted in a tortured analysis to comply with the dictates of Nixon v. Warner Communications, Inc.109 and Gunn I. For example, in United States v. McDougal,110 President Clinton was permitted to testify in a criminal trial by video deposition rather than in person. The media sought a copy of his video deposition much as the media had sought copies of the tapes of President Nixon in Nixon v. Warner Communications, Inc. The district applied Nixon and denied access. The Eighth Circuit affirmed the district court and held that the videotape was not a judicial document.111 Thus, according to the court, the case was distinguishable from Gunn I, and the Nixon common law access standard applied.112 The Eighth Circuit's application of Nixon's common law access test in McDougal and its application of a First Amendment test in Gunn I fails to appropriately consider what is occurring in the justice process. If, for example, only a qualified common law right to access exists for documents admitted into evidence in a public criminal trial,113 how can the greater First Amendment right of access exist for documents presented in a closed ex parte proceeding, such as the issuance of a pre-indictment search warrant?

108. Gunn I, 855 F.2d 569, 572–73 (8th Cir. 1988). Gunn I applies the test found in Press-Enterprise II, namely, "whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." Id. (quoting Press-Enterprise II, 478 U.S. 1, 8 (1986)).
110. 103 F.3d 651 (8th Cir. 1996).
111. Id. at 656.
112. Id. at 659, n.16.

In *Times Mirror*, the court analyzed whether access should be granted either on the basis of the First Amendment or the common law.\(^\text{114}\) The court concluded that no access should be granted to the documents at the pre-indictment stage of the justice process. The Ninth Circuit reasoned, however, that since the right of access is a "qualified right" under either test, if no access was warranted there was no actual right of access at that juncture. As set forth in *Times Mirror*, there is no distinction between the qualified right of access and the application of a test to determine whether the right prevails in a specific context.

This analysis is no more helpful in setting out a framework for balancing the competing interests than the document/process distinction of *Gunn I*. A more preferable approach is articulated in *In re Macon Telegraph Publishing Co.*, which found that “[a] common law right of public access exists in all instances. Whether the public may exercise that right in a particular context, or whether that right is outweighed by paramount concerns, is a different question.”\(^\text{115}\)

C. Blending the First Amendment Standard with the Common Law Access Test

In *Baltimore Sun*, the Fourth Circuit unequivocally rejected the First Amendment as the basis for an access analysis and explicitly recognized that the common law test was more appropriately applied.\(^\text{116}\) Yet, in applying the common law test to the specifics of the case at hand, the court incorporated a portion of the First Amendment test—the standard from *Press-Enterprise I* requiring that the restriction be “"narrowly tailored to serve [the interest at issue]."”\(^\text{117}\)

This approach is no more analytically correct or helpful than either *Gunn I* or *Times Mirror*. As evidenced by the district court cases purporting to follow *Baltimore Sun*, the application is a confusing mix of a simple balancing of the competing interests under the discretion of the issuing court and a requirement that the party seeking closure establish a compelling interest.\(^\text{118}\)

\(^\text{114}\) Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989).


\(^\text{116}\) Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989); see *supra* note 86 and accompanying text.

\(^\text{117}\) *Baltimore Sun*, 886 F.2d at 65 (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

\(^\text{118}\) See *supra* note 96 and accompanying text.
The confusion created by the circuit decisions has filtered down to the procedural level in the district courts. Because district courts are charged with applying the access tests and standards, some have developed specific sealing and disclosure procedures or rules for search warrant materials. One example of such procedure is the sealing and disclosure rule used in the Eastern District of Arkansas. The procedural flaws of the Eastern District of Arkansas’s general orders discussed below are not surprising given the precedent of the circuit court analysis.

VIII. PRACTICAL APPLICATION OF THE LAW AND ACCESS THEORY

Local courts have the authority to issue operating rules for the court, usually referred to as general orders.\(^\text{119}\) Until recently in the Eastern District of Arkansas, General Order 22 was the rule governing pre-indictment access to search warrant materials.\(^\text{120}\) In 2001 as a result of a media request for access to pre-indictment search documents,\(^\text{121}\) the District Court for the Eastern District of Arkansas reexamined its procedures for disclosure of search warrant materials and found existing procedures faulty under *Gunn I*. Accordingly, the court adopted a new rule—Amended General Order 22.\(^\text{122}\)

Ideally, incorporating the law and theory discussed above, a well-drafted court rule governing access to search warrant documents should (1) provide a framework for balancing the differing interests of the individual, the government, and the public; (2) provide some form of public notice that search warrant documents exist; (3) provide a mechanism for requesting access to or sealing of the documents; (4) assign a burden of proof for demonstrating whether access should be granted; and (5) recognize that the various interests change over time according to the status of the case in the justice process.

Eastern District of Arkansas General Order 22 and Amended General Order 22 are examples of attempts to institute practical procedures, based on the common law and First Amendment access tests, to give appropriate access to search warrant materials. Each of the rules succeeds in part and fails in part in meeting the five objectives of the well-drafted rule.

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119. *See* 28 U.S.C. § 2071 (2000). General Orders govern the day-to-day operations of the court. For example, Eastern District of Arkansas General Order 39 governs procedures for assignment of cases among judges, and General Order 31 prohibits a judge’s law clerk from practicing before that judge for a period of two years after leaving his or her employ.

120. *See infra* Appendix A.

121. The matter concerned a search warrant executed on the residence of Carl Wilson. During the execution of the search warrant, Mr. Wilson was shot and killed by law enforcement.

122. *See infra* Appendix B.
A. General Order 22

The former General Order 22 was drafted pre-\textit{Gunn I}. Therefore, the First Amendment test in \textit{Gunn I} was not yet law in the Eighth Circuit. In a common law context, General Order 22 met most but not all of the five objectives. First, it provided for automatic sealing of search warrant documents pre-indictment. In so doing it reflected a valid presumption that balancing the relative interests (individual, government, and public) favors non-disclosure of search warrant materials pre-indictment (objectives 1 & 5). Second, it provided that, following the filing of charges, the search warrant documents would be placed in the open case file. This aspect of the rule reflects the premise that the relative interests weigh in favor of access once formal charges are filed (objective 5). Third, the rule provided a mechanism for seeking access prior to charges being filed and assigned the burden of persuasion (objectives 3 & 4).\footnote{123}

General Order 22, however, failed to meet the five objectives in several respects. First, it failed to provide notice to the public that a search warrant had been issued and that pertinent documents existed (objective 2). Only directly affected parties would know to request access, thus failing to recognize the general public's interest.\footnote{124} Second, General Order 22 did not address circumstances that might warrant continued closure of the search materials following the initiation of some, but not all possible, charges (objective 5). If, for example, one person was charged in an otherwise ongoing investigation, there may be less justification for continued sealing as to that person, but there may be ample justification for continued closure of information in the ongoing investigation.\footnote{125} Continued sealing might be desired and needed by the government or a subject individual.\footnote{126} Moreover, the rule failed to consider that even if full sealing may not be required, redaction of certain parts of the search warrant documents may serve the interests of the

\footnote{123} Specifically, the rule directed a person or entity seeking access to file a motion with the issuing judicial officer. The motion was required to state good cause for the request. Good cause, however, was presumed when the movant was a person directly affected by the warrant. When an affected individual sought access, any party seeking continued sealing carried the burden of showing why access should be denied.

\footnote{124} This shortcoming of the rule could have been remedied by providing that the clerk of court maintain a public docket that records the issuance of a search warrant but does so without revealing any information other than the existence of a search warrant. For example, the docket could simply reflect "\textit{In re Search}" with the assigned unique magistrate number.

\footnote{125} \textit{In re Four Search Warrants}, 945 F. Supp. 1563, 1565 (N.D. Ga. 1996). The potential subject, Richard Jewell, was granted access to search warrant documents. \textit{Id.} The court initially required, however, that he be prohibited from public disclosure. \textit{Id.}

\footnote{126} See \textit{id.} (involving continued closure sought by government, but individual and media concurring as to media access); \textit{In re Application of Newsday}, Inc., 895 F.2d 74, 75 (2d Cir. 1990); \textit{Gunn II}, 895 F.2d 460, 461 (8th Cir. 1990) (involving continued closure sought by individual, but government and media concurring as to media access).
various parties. Third, the mechanism for seeking access fails to consider the disclosure implications of the actual motion to unseal or to continue sealing (objective 3). In other words, it failed to explain to what extent documents that are filed and hearings that are held to determine access to the search warrant materials may be closed to the public or conducted in camera.

Finally, as an operating rule in a then "common law access" jurisdiction, General Order 22 was appropriate, but could have been more directive. Specifically, in addition to assigning the burden of proof and the operation of a presumption in certain circumstances, the operating rule could have specified the test to be applied—that access requires a balancing of the competing interests and is committed to the sound discretion of the deciding judicial officer.

B. Amended General Order 22

In 2001 the Eastern District of Arkansas sought to bring General Order 22 in line with the Eighth Circuit decisions in *Gunn I* and *Gunn II*. Although Amended General Order 22 brings the rule in line with a First Amendment right of access, it fails to meet each of the five objectives enumerated above.

First, Amended General Order 22 adequately addresses the public notice issue by providing for open docketing of search warrant materials in generic terms (objective 2). Second, the order provides a mechanism to challenge access and the closure of proceedings and documents that occur during the decision making process (objective 3). Third, under the First Amendment right to access, Amended General Order 22 properly sets forth the burden of proof and the applicable test (objective 4).

In other aspects Amended General Order 22 is lacking. The rule is inadequate because its application of the First Amendment test fails to consider the true objectives of access to search warrant documents at various stages in the justice process. Specifically, the rule rejects the automatic sealing of search warrant documents at the time of their issuance, provides artificial requirements and time frames for filing a motion to seal or opposing a motion to unseal pre-indictment, and fails to provide a mechanism for con-

127. *In re Four Search Warrants*, 945 F. Supp. at 1569–70 (permitting identification information as to third parties, information about government investigative methods, and details of bomb device to be redacted).


129. General Order 22 was initially amended on July 31, 2001. Following comments from the government and members of the public, the order was modified on September 20, 2001 to provide for the automatic unsealing of warrant papers after an indictment or information is filed.
continued sealing following the filing of formal charges. In short the rule fails to consider the legal and factual reality surrounding the issuance of a search warrant, fails to consider adequately all the relevant interests at stake pre-indictment, and sets forth a decision-making framework that creates more problems than it solves.

1. The Lack of Automatic Sealing

The rule rejects automatic sealing of search warrant documents in favor of a requirement that the government file a motion for closure either at the time the warrant is requested or within five working days after its execution. This requirement ignores the practical and legal parameters of search warrants. For example, when the government requests a search warrant, it has an ongoing investigation; otherwise the government would have neither a basis for seeking a warrant nor any means by which to establish probable cause. Because preserving the integrity of an ongoing investigation is one of the governmental interests that justifies continued sealing of search warrant materials, even under a First Amendment analysis automatic sealing of search warrant documents at the inception simply reflects factual and legal reality.

Second, irrespective of preserving the integrity of an ongoing investigation, the privacy interests of subjects of the investigation are paramount at this juncture in the judicial process. These individual privacy interests alone justify the complete sealing of the warrant material pre-indictment. Again, automatic sealing of search warrant documents at the inception would merely reflect this factual and legal reality.

Third, Amended General Order 22 does not adequately protect against disclosure by the government. While the government normally has an interest in sealing search warrant documents, there may be circumstances in which the government perceives its interest is not to seal the material. Absent an automatic sealing, there is no legal restriction on the government’s ability to disclose whatever aspects of the search and seizure it

130. The rule provides for limited automatic sealing in order to implement the procedural aspects of the rule. In particular Amended General Order 22 provides that the warrant papers will be sealed for five days following execution of the warrant and filing of the inventory return.

131. The fact that the judiciary must find probable cause to authorize a warrant is a check on the executive branch of government. It is part of the checks and balances built into our governmental system by the Constitution of the United States. See supra note 16 and accompanying text.

132. See Gunn I, 855 F.2d 569, 574 (8th Cir. 1988).

133. See Gunn II, 895 F.2d 460, 465 (8th Cir. 1990).

134. See supra note 30.
wishes, which may run afoul of the public and individual interests in non-disclosure.\footnote{135}{See chart \textit{supra} Part IV.B.}

2. \textit{Requirements for Motions To Seal and Responses to Motions To Unseal}

Amended General Order 22 requires that the motion to seal filed by the government at the time it requests a warrant set forth that “(a) the government has a compelling interest in . . . [closure]; and (b) no less restrictive alternative to sealing is appropriate or practical.”\footnote{136}{See Amended General Order 22, \textit{infra} Appendix B.} If the government seeks to seal the warrant after its issuance, it has five days from the date of execution to do so. In this latter circumstance, the motion must also establish that the “basis for sealing was not known at the time of the warrant application, despite due diligence.”\footnote{137}{\textit{Id.}}

These requirements and restrictions raise serious issues for a meaningful balance of the interests at stake. First, requiring the government to state specifically its “compelling interest” at the time it seeks a warrant ignores the importance of the inherent investigative status of the case pre-indictment. Essentially, this requirement is an outgrowth of the rule’s inattention to the reality discussed above. Moreover, the requirement that the government justify why a later motion to seal was not filed at the time of the warrant application injects a standard into the balancing equation that has no basis in the First Amendment test and no proper role.

The second serious concern is that the rule appears to restrict the government’s basis for seeking closure to a \textit{compelling governmental interest}. This leaves no room for the government to assert the privacy interests of affected persons, such as targets, their families or associates, and witnesses.\footnote{138}{While the privacy interests of government informants, and even perhaps third parties who provide information to the government, may be expressed in terms of a “governmental interest” as opposed to an individual privacy interest, the interests of investigative subjects or associates that are mentioned in the application may be excluded under this rule.} Legally, the government may assert those interests as grounds for closure.\footnote{139}{United States v. Sealed Search Warrants, Nos. 99-1096, 99-1097, 99-1098, 1999 WL 1455215, at *8 (D. N.J. Sept. 2, 1999).} Certainly, an argument can be made that the government has a duty to assert those interests. After all, the government is charged with the responsibility of respecting and preserving the rights of its citizens, including the individual’s privacy interest in non-disclosure of search warrant material.\footnote{140}{See \textit{supra} Part IV.A.2.}
Third, Amended General Order 22 provides that affected persons who have an assertable privacy interest may file a motion to seal within the five-day automatic sealing time frame. The rule, however, neither defines "affected persons" nor provides a means of notifying them that they may have a privacy interest in the search warrant materials that they may want to protect. In essence the rule presumes that an affected person is the one whose property is searched. This is obviously an erroneous assumption, because there may be others affected as well. There is both a property interest and an information privacy interest at stake, yet the rule’s notice presumption is only valid as to the property interest. In *Gunn I* it was MDC’s property that was searched. Moreover, the litigation focused on a search warrant for an area not directly under Gunn’s control—it was the search of the *secretarial area outside the office of Thomas Gunn*. Obviously Gunn became aware of the search warrant and intervened to assert his own privacy interests, as did four other unidentified persons.

Suppose for example that the place to be searched is a house belonging to A where drugs have been stored by and for B. Execution of the search warrant requires that a copy of the warrant and the inventory return be left with A or at the premises. Thus, absent the institution of a notice requirement not contemplated by nor provided for by the Rules of Criminal Procedure, B would only know of the warrant if A tells him.

Finally, the order appropriately provides that a person or entity wanting to challenge the sealing of warrant papers must submit a motion stating the specific grounds for access. The order also appropriately provides that the burden is on the party seeking continued closure. The order appears to restrict opposition to the motion, however, to the party that obtained the original order to seal. Again, using *Gunn I* as an example, the government obtained the original order to seal and successfully defended against a media request for access. Subsequently, the government notified the district court that it no longer had a reason to continue closure, and the media renewed its request. MDC, Gunn, and four other persons successfully opposed

141. See *Gunn I*, 855 F.2d 569, 574 (8th Cir. 1988).
142. *Id.*
143. See *Gunn II*, 895 F.2d 460, 461 (8th Cir. 1990).
144. FED. R. CRIM. P. 41(f)(3).
145. Presumably the individual seeking closure of warrant material would have access to the search material, including the affidavit, since this scenario would only be meaningful if the government had chosen not to seek closure of the warrant material.
146. The burden on the party seeking continued closure is appropriate because of the First Amendment application.
147. In pertinent part, Amended General Order 22 reads: “In opposing . . . a motion [seeking to challenge the sealing of warrant documents], the party who obtained the order to seal has the burden of establishing that a compelling interest justifies a restriction . . . .” See infra Appendix B (emphasis added).
disclosure in *Gunn II*. Under Amended General Order 22, once the government withdraws its request to continue closure, no other party can move for continued sealing, and the warrant material becomes public.

3. Post-Charge Process

The final limitation of Amended General Order 22 concerns the process once charges are filed. Like General Order 22, the Amended Order provides that the sealed material is to be opened after a related indictment or information is filed. Also similar to General Order 22, the Amended Order provides no further process and contemplates no situation in which continued closure might be warranted either to protect a governmental interest or an individual privacy interest.148

IX. PROPOSED SOLUTION

The most important aspects of determining pre-indictment access to search warrant materials are the balancing of identified interests and consideration of the importance of the interests given the status of the case in the justice process. These premises can be embodied in an access rule or procedure that places discretion with the court to balance the interests at hand according to the posture of the case and the phase of the proceedings.

Such a procedure would be similar to the common law access referenced in *Times Mirror*149 and more correctly applied, analytically, in *In re Macon Telegraph Co.*150 The common law access test does not place a right of access with the public or the individual, but rather requires the party seeking access to show that "disclosure would serve the ends of justice."151 Where circuit courts have applied the common law access test in the pre-indictment, investigative stage, the government's interest in investigation always seems to override a "need to know."152

Current law in the Eighth Circuit poses additional challenges to drafting a pre-indictment access procedure. Under the First Amendment test in *Gunn I*, a constitutional right of access is paramount, with the burden to show continued closure resting upon the government or affected party.153 It is worth noting that the Eighth Circuit takes great pains to draw the First Amendment test from post-indictment cases, and gives virtually no consid-

148. See supra note 122 and accompanying text.
149. See Times Mirror Co. v. United States, 873 F.2d 1210, 1218–19 (9th Cir. 1989).
151. *Times Mirror*, 873 F.2d at 1219 (holding that, "[u]nder this important public need or 'ends of justice' standard, appellants' claim [for access] must be rejected").
152. See id.; Baltimore Sun Co. v. Goetz, 886 F.2d 60, 66 (4th Cir. 1989).
153. *Gunn I*, 855 F.2d 569, 574 (8th Cir. 1988).
eration to the nature of the interests at stake pre-indictment. Even after a thorough analysis of the constitutional right, however, the court found in favor of non-disclosure pre-indictment. This was true whether the government or an affected party sought continued closure.\textsuperscript{154} Given the Eighth Circuit’s conclusions in \textit{Gunn I} and \textit{Gunn II}, it is hard to imagine a circumstance where a First Amendment right of access would ever prevail over the need for non-disclosure pre-indictment.

In addition the rule recognizes the presumption of non-disclosure from the time the warrant is issued through the time official charges are filed. This presumption can be implemented through automatic sealing of the search warrant documents pre-indictment. Without automatic sealing, filing a motion to seal is left to the discretion of the government. Although the government usually moves to seal such material, it is not required to do so, and, in some cases, has not. This leaves affected individuals without the protection of non-disclosure from the beginning and essentially no remedy once information is released publicly.\textsuperscript{155}

Whether applying the Eighth Circuit First Amendment test or another circuit’s common law access test, an access procedure can be drafted to embody the five objectives of a good access rule. The primary differences in the First Amendment rule and the common law access rule are the party who bears the burden of proof and the standard of proof required. Under the First Amendment, the party seeking closure bears the burden of showing a ‘compelling interest for sealing,’ and why ‘no less restrictive means are available.’\textsuperscript{156} Under the common law, the party seeking access bears the burden of showing a need for access that meets the ends of justice.\textsuperscript{157} If these burdens and standards of proof are considered by the court along with (1) an acknowledgment of the interests; (2) public notice that the documents exist; (3) a mechanism for requesting access (or continued sealing); and (4) recognition of the interests in the context of the stage of the justice process, the rule will adequately address access to search warrant materials. An example of a rule drafted for a First Amendment jurisdiction and a common law jurisdiction are attached in Appendices C1 and C2, respectively. It is probable that in the majority of pre-indictment cases, the need for continued sealing will prevail under either access test.

\textsuperscript{154} See generally discussion of \textit{Gunn I} and \textit{II}, supra Parts IV.A–B.

\textsuperscript{155} See supra note 30.

\textsuperscript{156} See \textit{Gunn I}, 855 F.2d at 574 (quoting \textit{In re N.Y. Times Co.}, 828 F.2d 110, 115 (2d Cir. 1987)) (adopting the burden of proof in \textit{Press-Enterprise II}, which requires the party to show that “closure is essential to preserve higher values and is narrowly tailored to that interest,” and adopting the standard in \textit{Press-Enterprise I}, noting that the court must “explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate”).

\textsuperscript{157} See \textit{Times Mirror}, 873 F.2d at 1219.
X. CONCLUSION

One foundation of democracy is an open society, and the concept of an open society necessarily means public access to governmental functions. Societal interests are not promoted at every instance, however, by immediate public access. For example, the investigation and prosecution of criminal conduct is to the benefit of society, not to its detriment. In determining the extent and scope of access to search warrant documents, it is essential to consider the interests at stake, namely those of the government, the affected individual, and the public. It is also essential to recognize that these interests vary at different stages in the justice process and may result in different access outcomes. Insofar as courts have dealt with the conflicting interests in addressing access to search warrant materials, they have failed to differentiate the process from the result and have failed to articulate a meaningful standard by which other courts may be guided.

In the final analysis, it is clear that courts heavily support closure of search warrant materials prior to the initiation of charges but favor access following the filing of charges, save redaction to protect the informational privacy interests of uncharged persons. The proposed decisional framework set forth in the appendix reflects this legal reality.

APPENDIX A

GENERAL ORDER 22 (AS ADOPTED ON JUNE 14, 1982)

Upon the return of an executed search warrant issued by a magistrate or judge of this Court, all papers in connection therewith shall be filed by the magistrate with the Clerk of the Court. The Clerk shall maintain a miscellaneous confidential file containing the warrant and all other papers until an indictment or information is filed. Thereafter, the Clerk shall transfer the warrant and other papers to the case file.

Any person desiring a copy of the papers maintained in the confidential files must file a motion, directed to the magistrate or judge, requesting release of the material. The motion must demonstrate good cause for said request. Good cause is presumed when the request is made by persons directly affected by execution of the warrant or their attorneys.
Because there is a compelling interest in protecting from public disclosure all search or seizure warrant-related documents until the warrant is executed or becomes unexecutable and because no less restrictive alternative is practical to protect that interest, the issuing District or Magistrate Judge must maintain the confidentiality of all warrant-related documents until they are delivered to the Clerk for filing. Upon receipt of the return inventory on an executed warrant, or upon expiration the time specified in the warrant for its execution, the Judge must deliver all warrant-related papers to the Clerk of Court for filing in a miscellaneous warrant file.

In order to request that the Judge seal some or all of the documents in any miscellaneous warrant file, the United States Attorney must submit an ex parte motion to seal, along with a proposed Order granting that motion. This motion must state reasonably specific facts which establish that: (a) the government has a compelling interest in sealing the documents in question which outweighs the public’s qualified first amendment right of access to review those documents; and (b) no less restrictive alternative to sealing is appropriate or practical. Ordinarily, such a motion must be filed at the time of application for the warrant. If grounds to seal arise after the warrant has been issued, the United States may, within five working days after the Clerk has filed the warrant papers, submit an ex parte motion to seal and a proposed order. The motion must establish, in addition to the above grounds, that the basis for sealing was not known at the time of the warrant application, despite due diligence.

Because there may be cases in which a person’s or other entity’s privacy interests rise to the level of a compelling interest sufficient to justify sealing documents in a warrant file, such persons or entities may file a motion to seal, ex parte, within five working days after the Clerk has filed the warrant papers.

If no motion to seal has been filed within five working days after the Clerk has filed the warrant papers, the Clerk must open the file to the public for inspection and copying. If a motion to seal is filed, the miscellaneous warrant file must remain sealed until the Judge has ruled on the motion. The Judge must rule on any motion to seal within five working days after the motion is filed. If a motion to seal is denied, the miscellaneous warrant file must remain sealed during the period in which an appeal may be filed.

When the Judge delivers the warrant papers to the Clerk for filing, the Clerk must create and maintain a separate miscellaneous file which must contain the application for the warrant, all supporting affidavits and any
return inventory, related motions or orders. The Clerk must also create and maintain a docket sheet, open to the public for inspection and copying, for every miscellaneous warrant file, including files in which an order to seal has been entered. The docket sheet must contain docket entries that describe generally each document in the file and reflect the number of pages of each such document. If the Judge enters an order granting a motion to seal, the Clerk must maintain all documents within the scope of the order to seal in a sealed miscellaneous file.

Any person or other entity seeking to challenge the grounds supporting an order to seal documents contained in a miscellaneous warrant file must submit a motion, directed to the Magistrate Judge or District Judge who signed the warrant, stating specific grounds supporting the release of the sealed documents. In opposing such a motion, the party who obtained the order to seal has the burden of establishing that compelling interest justifies a restriction of the public's qualified first amendment right of access to the documents in question and that no less restrictive alternative to sealing is appropriate or practical. In appropriate case, the Judge may conduct an in camera hearing to develop the facts necessary to determine whether a compelling interest justifies sealing the documents in question. If the Judge concludes that the documents should remain under seal, the Judge will enter an order under seal containing specific findings that explain why sealing is necessary and why no less restrictive alternatives are practical or appropriate. The Clerk must open any sealed miscellaneous warrant file after a related indictment or information is filed. (Emphasis in original.)

APPENDIX C-1

EXAMPLE ACCESS RULE—COMMON LAW RIGHT OF ACCESS JURISDICTION

A. Issuance of a Warrant; Warrant-Related Material Prior to the Execution and Return of Inventory

Because there exist governmental and personal privacy interests that outweigh the public's qualified common law right of access to unexecuted search or seizure warrant-related documents, upon issuance of a search or seizure warrant, the issuing District Judge or Magistrate Judge must maintain the confidentiality of all warrant-related documents.

B. Return of Inventory or Unexecuted Warrants

Upon receipt of the return inventory on an executed warrant, or upon expiration of the time specified in the warrant for its execution, the Judge must deliver all warrant-related papers to the Clerk of Court for filing in a
confidential miscellaneous warrant file. The Clerk must create and maintain a docket sheet, open to the public for inspection and copying, for every miscellaneous warrant file. The docket sheet must contain docket entries that describe generally each document in the file and reflect the number of pages of each such document.

C. Sealing of Warrants and Warrant-Related Documents; Release to Defendant or Counsel for Defendant

Because there are ongoing governmental and personal privacy interests in the contents of the executed search warrant-related documents prior to the institution of charges against an individual or entity, the Clerk of Court shall maintain these documents under seal. Once charges have been filed against an individual or entity affected by the search warrant, and the individual or entity has made an initial appearance or appeared for an arraignment before a Magistrate Judge or District Judge, whichever occurs first, the defendant and/or counsel for the defendant is entitled to a copy of the warrant, return of inventory, application for the warrant, and any attachments thereto. After the passage of five working days from the initial appearance or arraignment, the Clerk must open the file to the public for inspection and copying, unless an affected party or the United States files a motion seeking continued closure of the warrant.

D. Request for Access

At any time before warrant-related material becomes open for public inspection and copying by application of Paragraph C of this Rule, any person may request unsealing of the warrant-related material. The request for unsealing shall be done by written motion directed to the Magistrate Judge or District Judge who signed the warrant and shall state specific grounds supporting the release of the sealed documents.

E. Burden of Proof and Procedure

A party filing a motion for continued closure of warrant-related material pursuant to Paragraph C of this Rule, or a party filing a motion for access to warrant-related documents pursuant to Paragraph D of this rule, has the burden of establishing that the requested action meets the ends of justice, and that their interest outweighs any competing government, individual or public interest. In appropriate cases, the Judge may receive pleadings and/or material in camera and may conduct an in camera hearing to develop the facts necessary to determine whether a compelling interest justifies the continued sealing of the documents in question. If the Judge concludes that the documents should remain under seal, the Judge will enter an order under
seal containing specific findings that explain why sealing is necessary and why no less restrictive alternatives are practical or appropriate. During the pendency of any such motion or opposition to such motion, the file shall remain sealed unless directed otherwise by the Magistrate Judge or District Judge before whom the motion is pending.

F. Stay During Appeal

If the District Judge or Magistrate Judge determines that all or part of warrant-related materials should be unsealed, the Judge’s order and all other warrant-related material shall remain sealed until the time to file notice of appeal has expired, or during the pendency of any appeal so filed.

APPENDIX C-2

EXAMPLE ACCESS RULE—FIRST AMENDMENT RIGHT OF ACCESS JURISDICTION

A. Issuance of a Warrant; Warrant-Related Material Prior to the Execution and Return of Inventory

Because there exist compelling governmental and personal privacy interests that outweigh the public’s qualified First Amendment right of access and qualified common law right of access to unexecuted search or seizure warrant-related documents, and because no less restrictive alternative is practical to protecting these interests, upon issuance of a search or seizure warrant the issuing District Judge or Magistrate Judge must maintain the confidentiality of all warrant-related documents.

B. Return of Inventory or Unexecuted Warrants

Upon receipt of the return inventory on an executed warrant, or upon expiration of the time specified in the warrant for its execution, the Judge must deliver all warrant-related papers to the Clerk of Court for filing in a confidential miscellaneous warrant file. The Clerk must create and maintain a docket sheet, open to the public for inspection and copying, for every miscellaneous warrant file. The docket sheet must contain docket entries that describe generally each document in the file and reflect the number of pages of each such document.
C. Sealing of Warrants and Warrant-Related Documents; Release to Defendant or Counsel for Defendant

Because there are compelling ongoing governmental and personal privacy interests in the contents of the executed search warrant-related documents prior to the institution of charges against an individual or entity, the Clerk of Court shall maintain these documents under seal. Once charges have been filed against an individual or entity affected by the search warrant, and the individual or entity has made an initial appearance or appeared for an arraignment before a Magistrate Judge or District Judge, whichever occurs first, the defendant and/or counsel for the defendant is entitled to a copy of the warrant, return of inventory, application for the warrant, and any attachments thereto. After the passage of five working days from the initial appearance or arraignment, the Clerk must open the file to the public for inspection and copying, unless an affected party or the United States files a motion seeking continued closure of the warrant.

D. Request for Access

At any time before warrant-related material becomes open for public inspection and copying by application of Paragraph C of this Rule, any person may request unsealing of the warrant-related material. The request for unsealing shall be done by written motion directed to the Magistrate Judge or District Judge who signed the warrant and shall state specific grounds supporting the release of the sealed documents.

E. Burden of Proof and Procedure

A party filing a motion for continued closure of warrant-related material pursuant to Paragraph C of this Rule, or a party opposing a motion which has been filed seeking to unseal warrant-related documents pursuant to Paragraph D of this rule, has the burden of establishing that a compelling interest justifies a restriction of the public's qualified First Amendment right of access to the documents in question articulated by the Eighth Circuit in In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn (Gunn I),\textsuperscript{158} and that no less restrictive alternative to continued sealing is appropriate or practical. In appropriate cases, the Judge may receive pleadings and/or material in camera and may conduct an in camera hearing to develop the facts necessary to determine whether a compelling interest justifies the continued sealing of the documents in question. If the Judge concludes that the documents should remain under seal, the Judge will enter an

\textsuperscript{158} 855 F.2d 569 (8th Cir. 1988).
order under seal containing specific findings that explain why sealing is necessary and why no less restrictive alternatives are practical or appropriate. During the pendency of any such motion or opposition to such motion, the file shall remain sealed unless directed otherwise by the Magistrate Judge or District Judge before whom the motion is pending.

F. Stay During Appeal

If the District Judge or Magistrate Judge determines that all or part of warrant-related materials should be unsealed, the Judge’s order and all other warrant-related material shall remain sealed until the time to file notice of appeal has expired, or during the pendency of any appeal so filed.