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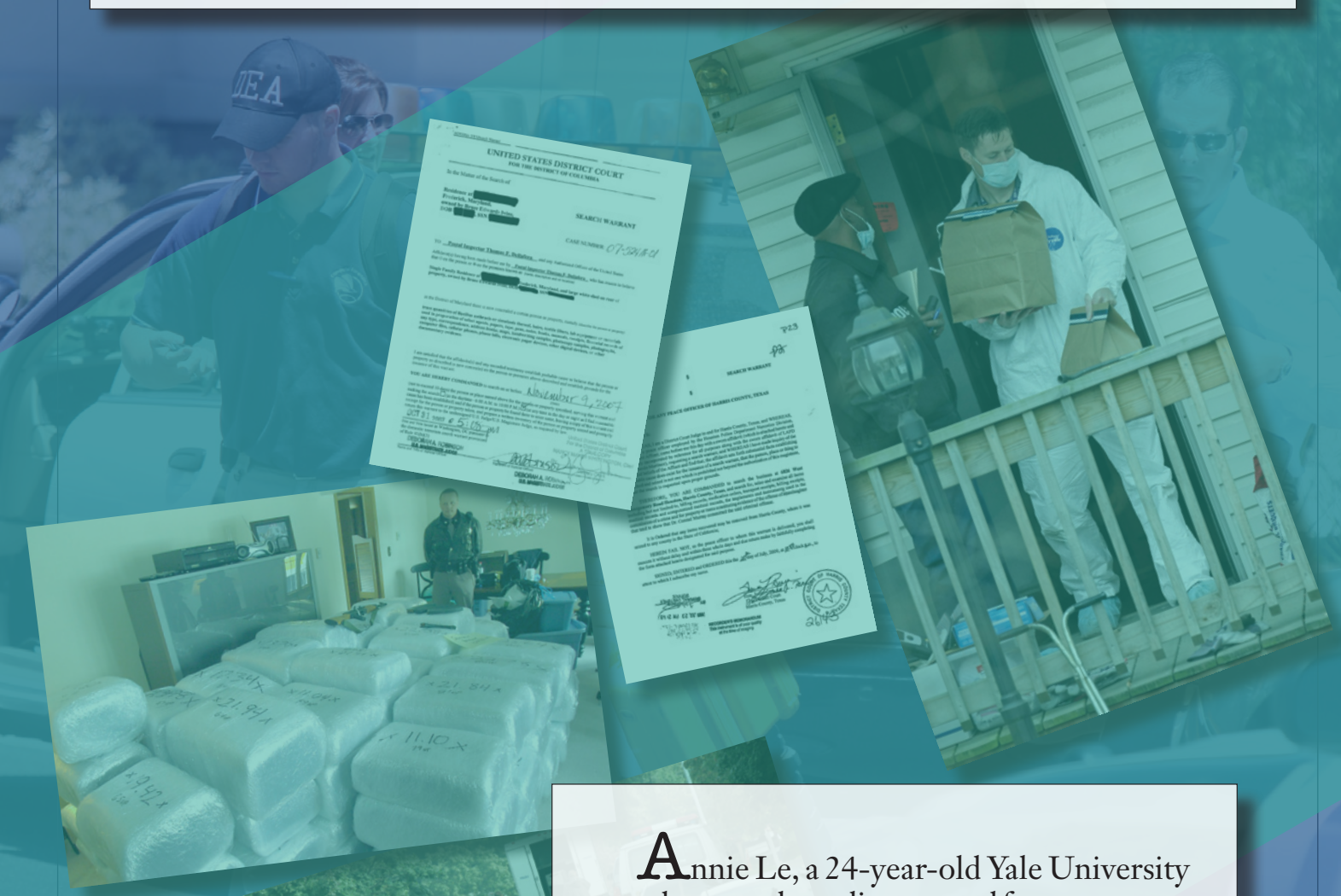
Secret Justice:

Warrants and Wiretaps



Annie Le, a 24-year-old Yale University graduate student, disappeared from a campus laboratory on September 8, 2009. Her disappearance sparked intense national interest, with news organizations from across the country descending on New Haven to cover the search. The media frenzy was so great, the *New Haven Independent* reported, that an NBC producer was trampled and injured in the crush leading up to a police briefing.

continued inside

REPORTERS COMMITTEE
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Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection.

Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — well informed — about trials of public interest. The media, as the public's representative, need to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We examine trends toward court secrecy, and what can be done to challenge it.

For the complete series of "Secret Justice" publications, visit www.rcfp.org/readingroom.

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AP Photos

The news media had to fight to unseal warrant information in the case against Raymond Clark, accused of murdering Yale student Annie Le.

Le was found dead on Sept. 13, the day she had planned to be married, inside the wall of the university building where she was last seen. A medical exam found that she had been asphyxiated. Police arrested Raymond J. Clark III, a lab technician at the school, four days later. But, due to leaks from law enforcement and the fact that he had been named a "person of interest" in the murder, Clark had already been the subject of intense public scrutiny. Even before Clark was arrested, his identity was widely known and angry protesters reportedly stood outside his house.

While leaks and rumors swirled, key information was missing from the coverage of the murder. Nine search warrants and an arrest warrant were kept secret by a Connecticut judge for weeks. The same was true of the affidavits attached to the warrants, which disclosed the probable cause to search Clark's residence, collect his DNA, and arrest him. Under Connecticut law, the court was able to keep the warrants and related materials under seal.

For weeks after the searches were conducted and Clark was arrested, both his lawyers and state prosecutors fought to keep the information sealed. *The Hartford Courant* intervened in the case on Oct. 6, 2009, opposing the efforts to renew the seal on the warrants and related material. Two weeks later, the *New Haven Register*, The Associated Press and *The New York Times* joined the *Courant*'s opposition.

Connecticut Superior Court Judge Roland D. Fasano unsealed the warrant materials on Nov. 6, 2009, more than seven weeks after Clark was arrested. Even then, he redacted "material that is inflammatory; material of significant import that is unfairly prejudicial to the defendant; and material that constitutes an invasion of privacy unnecessary to the public's understanding of the criminal process."

While the public scrutiny of the Le investigation is unusual, Judge Fasano's restrictions on warrant access are not. Warrants, wiretaps, and related materials exist in the grey area between law enforcement and court records. They are authorized by a judicial officer, but generated and held for some time by the police before they are ultimately filed in court. Because of this — as well as concerns for the integrity of ongoing investigations, defendants' rights, and privacy — it is often unclear what materials must be released to the public and how long courts can wait before doing so.

This guide will discuss the law governing access to search warrants, arrest warrants, wiretaps, and related materials. This includes the First Amendment and common-law presumption of access to court records, as well as the rules courts have set governing when warrants and related materials are made available to the public.

AP Photo
Police leave after executing a search warrant at a home in Los Angeles in September 2009 as part of an investigation into gang-related murders. Search warrant materials are not always open to the public and the press.

Search warrants

Search warrants and related materials are often treasure troves of information. Police generally attach affidavits to their applications for warrants in which they describe the evidence that, in their view, provides the "probable cause" necessary for a judge or magistrate to authorize the search. Reviewing these documents provides the press and public one of the best opportunities to keep tabs on criminal investigations.

Confusion in the courts.

As important as these documents are, however, courts have not been clear about whether the public has a right to review warrants and related materials. Indeed, in a series of cases arising out of the same 1988 investigation, different federal appellate courts came to very different conclusions.

The U.S. Court of Appeals in St. Louis (8th Cir.) heard one such case resulting from the investigation, in which federal agents executed more than 40 search warrants at offices around the country as part of an investigation of fraud and bribery in the defense industry. In that case, the warrant and attached materials had been sealed at the request of the government, but the publisher of the *St. Louis Post-Dispatch* sought access to the sealed warrant and related materials for the office of two employees of the McDonnell Douglas Corp., a Missouri-based defense contractor. (*In re Search Warrant for Secretarial Area-Gunn*)

The Eighth Circuit found that the First Amendment created a presumption of access to the search warrants and related materials. It reasoned that "although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal," and "public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct."

The court added that "a search warrant is certainly an integral part of a criminal prosecution" because "search warrants are at the center of pretrial suppression hearings, and suppression issues often determine the outcome of criminal prosecutions."

But the very next year, in another case arising from the same corruption investigation, the U.S. Court of Appeals in San Francisco (9th Cir.) refused to recognize a right of

access to search warrants and related materials.

"With all due respect," the court found, "we cannot agree with the Eighth Circuit's reasoning." The court found just because search warrants and supporting affidavits are often filed without a seal, that does not establish a First Amendment right of access to them.

It also rejected the idea that public scrutiny would improve the functioning of the warrant process, finding that "whatever the social utility of open warrant proceedings and materials while a pre-indictment investigation is ongoing, we believe it would be outweighed by the substantial burden openness would impose on government investigations."

But the court emphasized that it was not deciding the question of access to warrant materials when an investigation has been terminated or "an investigation is still ongoing, but an indictment has been returned." (*Times Mirror Co. v. U.S.*).

Further complicating matters, the U.S. Court of Appeals in Richmond (4th Cir.) that same year recognized a right of access to warrants, but it based the access right on the common law — case law developed by courts over long periods — rather than the First Amendment. In a case dealing with sealed affidavits attached to search warrants from an investigation of the health insurance industry, the court observed that "the circuits are split on the press's First Amendment right of access to search warrant affidavits." It agreed with the *Times Mirror* court that there was no First Amendment right of access to an affidavit for a search warrant, but it found that the affidavits were judicial records subject to a common-law presumption of openness. (*Baltimore Sun Co. v. Goetz*).

The practicalities

As these cases show, courts have differed sharply on the access rights to warrant materials. The *Goetz* court noted that the distinction between a First Amendment right and a common law right is significant because "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." On the other hand, the common law right is left to the "sound discretion of the trial court" based on the facts and circumstances of a particular case.

But, as stark as these differences seem, they often blend together in application during an active investigation. In the *Times Mirror* case, the court refused to recognize any right of access to warrant materials while an investigation is ongoing, allowing them to be sealed indefinitely. But even the *Gunn* court, which found that the First Amendment created a presumption of access to warrant materials, concluded that "the government has demonstrated that restricting public access to these documents is necessitated by a compelling government interest – the ongoing investigation."

It added that "line-by-line redaction of the sealed documents was not practicable" because "virtually every page contains multiple references to wiretapped telephone conversations or to individuals other than the subjects of the search warrants or reveals the nature, scope and direction of the government's on-going investigation." And while the *Goetz* court remanded the case for a more detailed determination, the Fourth Circuit has found in subsequent cases that the interest in protecting that investigation may overcome any public right of access. (*Media General Operations, Inc. v. Buchanan*)

After the investigation is over, however, the situation changes. The need to protect an ongoing investigation, often considering compelling, is no longer an issue. In one such case, for example, Newsday requested access to a search warrant application that included information from a wiretap. The application had originally been sealed at the government's request, but "following a guilty plea by the subject of the wiretap, the government withdrew its earlier objection to unsealing the application." The subject of the wiretap, however, still objected to public disclosure.

The U.S. Court of Appeals in New York (2nd Cir.) in 1990 recognized that other federal appellate courts disagreed on whether the public had a right to access warrant records while an investigation was still active. But it took no position on that split, instead finding a common law right to inspect the warrant application because by the time the request was made "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." (*In re Application of Newsday, Inc.*)

Courts often still balance the interests in privacy and a fair trial against the public interest in disclosure of warrant materials.

The U.S. Court of Appeals in Richmond (4th Cir.), for example, heard a case in 1991 dealing with a search warrant issued after "a five year old girl vanished from a community Christmas party she was attending with her mother in Fairfax County, Virginia." After a grand jury indicted a man for "abduction with the intent to defile," *The Washington Post* asked for the search warrant affidavit to be unsealed and the government agreed that most of the affidavit could safely be released. But the defendant opposed the motion, claiming release of the information would undermine his Sixth Amendment right to a fair trial.

The court ruled that "it cannot be that pretrial publication of affidavits in support of search warrants is altogether forbidden as a matter of law." The balance between access and fair trial rights must be "carefully struck in each case," it said.

The court noted that the presumption is in favor of access, and that pretrial publicity "cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." (*In re Application and Affidavit for a Search Warrant*).

As a practical matter, however, most trial courts will look first to statutes or court rules to determine whether search warrant materials can be sealed. For example, the court overseeing the Le case noted that Connecticut state law allows search affidavits to be sealed temporarily if the safety of a confidential informant would be jeopardized, if a continuing investigation would be affected, and if disclosure is prohibited under the wiretap statute.

"Of course, where a statute or court rule conflicts with a constitutional access right, it can be challenged," the court added. "But, especially at the trial court level, showing the court that the rules favor disclosure may be more effective than mounting a First Amendment challenge to secrecy."

AP Photo
A convicted murder is picked up by Massachusetts police after they served an arrest warrant for a parole violation in September 2007. Arrest warrants contain supporting documents that are valuable to journalists, but courts have been uneven in deciding when they can be unsealed.

Arrest warrants

Like search warrants, arrest warrants generally are supported with affidavits and other evidence that can be useful to reporters. But courts have been less active in determining when arrest warrants must be made public.

The Pennsylvania Supreme Court addressed the issue in 1987, finding a common-law (and perhaps constitutional) presumption of access to affidavits attached to arrest warrants. The case, *Commonwealth v. Fenstermaker*, dealt with three defendants who "were arrested pursuant to warrants issued by a magistrate in connection with charges of homicide, rape, indecent assault, conspiracy, and underage drinking."

The arrest warrants were based on affidavits in which a police detective explained the basis of probable cause to arrest the defendants. After their arraignment but before preliminary hearings, a newspaper requested access to the affidavits.

The court noted that the newspaper was seeking the warrant information after an actual arrest was made, not before. Because documents filed with magistrates are judicial documents, and arrest warrant affidavits become a part of the permanent record of the case, the court found that "the affidavits in question cannot be regarded as private documents, but rather must be taken to be part of the official public case record."

It therefore recognized a common-law presumption of access to arrest warrants and related materials. Because of the presumption of access, the court concluded that after arrests have been made pursuant to warrants, the supporting affidavits must be publicly available, unless the court specifically orders them to be sealed. It added that because the common law right protects such information from automatic sealing, it did not need to reach the First Amendment issue.

Similarly, the Connecticut rules at issue in the Annie Le case provide that affidavits submitted in support of a request for an arrest warrant are presumptively open. A judge may seal them "upon written request of the prosecuting authority and for good cause shown" for up to two weeks. The court may renew the seal, but renewal is permitted only if a higher standard is met — the court must find that renewal "is necessary to preserve an interest which is determined to override the public's interest in viewing such materials." Judges must "first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest."

As the court in the Le case noted, Connecticut's rules were "fashioned to mirror United States Supreme Court precedent and supporting federal and state authorities regarding the public right to access documents filed in connection with criminal cases."

In recognition of this presumption of openness, the court released the affidavits supporting Raymond Clark's arrest warrant after redacting "material that is inflammatory; material of significant import that is unfairly prejudicial to the defendant; and material that constitutes an invasion of privacy unnecessary to the public's understanding of the criminal process."

The case law that exists therefore suggests that arrest warrants and related materials generally are considered to be court records subject to either a common-law or a constitutional presumption of openness, at least once the arrest is made and the warrant return filed with the court. This presumption can be overcome under some circumstances, which range from a showing of "good cause" to a finding that the sealing is narrowly tailored to meet an overriding interest.

Wiretaps

Though not involved in the Le case, wiretaps materials also are often sought by the press in other criminal cases. Wiretaps, whether made by state or federal authorities, are controlled by Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 (often called Title III). Congress enacted Title III with the intent of "protecting the privacy of wire and oral communications," including from law enforcement wiretaps.

Title III thus provides that applications for wiretaps and orders allowing them must be sealed by the judge, and that "such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction." It also makes it a crime to disclose wiretap materials — such as transcripts, summaries, and logs — that were obtained in violation of the law.

Defendants or prosecutors sometimes claim that Title III flatly prohibits courts from releasing information obtained from wiretaps. But, as one federal appellate court noted, "Title III creates no independent bar to the public's right of access to judicial materials with respect to wiretap materials legally intercepted and admitted into evidence pursuant to the statute." (*U.S. v. Rosenthal*). Indeed, another court found that while wiretap recordings may be exempt from disclosure under the Freedom of Information Act, they still must be released if they have been "introduced into evidence and played in open court during a public criminal trial." (*Cottone v. Reno*).

Title III and the First Amendment.

Once wiretap materials become part of the court record, most courts have concluded that the statute must bow to a constitutional presumption of access to court documents. In a 1987 New York case, for example, several press groups asked for access to wiretap materials filed in connection with a motion to suppress evidence in the highly publicized corruption prosecution which included charges against Mario Biaggi, a Democratic U.S. congressman from the Bronx. The materials sought included the government's wiretap application, several supporting affidavits, the order permitting a wiretap, and excerpts from that wiretap and a related one. (*In re New York Times Co.*).

The defendants argued "that Title III required continued sealing of the motion papers unless appellants could show good cause why the papers should be unsealed." Despite Title III, however, the Second Circuit found that the First Amendment presumption of access applies "to written documents submitted in connection with judicial proceedings that themselves implicate the right of access."

Thus, the court concluded, "where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a statute cannot override a constitutional right."

Though the access right is not absolute, the court noted that its "review of the sealed materials indicates that the wholesale sealing of the motion papers was more extensive than necessary to protect defendants' fair trial rights, their privacy interests and the privacy interests of third persons." It added that to protect any privacy interests, redaction of names and other materials would be more appropriate than wholesale sealing of the papers.

The balance of First Amendment access interest against privacy and fair trial rights went the other way in a case heard by the U.S. Court of Appeals in Boston (1st Cir.) in 1984. In that case, the court agreed "that the First Amendment right of access does extend to bail hearings and to documents filed in support of the parties' arguments at those hearings," even though they contained wiretap information.

But it added that the court had not yet decided whether the wiretap materials discussed at the bail hearing were obtained lawfully. Because Title III prohibits dissemination of unlawful wiretaps, the court looked to the fair trial and privacy rights of the defendants and concluded that the trial court was "correct in concluding that closure and impoundment are necessary to protect defendants' privacy and fair trial rights until defendants have had a fair opportunity to challenge the legality of the Title III material." (*In re Globe Newspaper Co.*).

At least one court, however, has found that Title III bars the release of wiretap transcripts that were presented in connection with a suppression motion. The U.S. Court of Appeals in Chicago (7th Cir.) found that Title III permits disclosure only under the specific circumstances given in the statute — for example, it allows disclosure during court testimony. The court, concluding that "Title III implies that what is not permitted is forbidden," thus refused to release wiretap evidence that was submitted to support a motion to suppress. (*Dorfman I*).

This conclusion was rejected by another appellate court, which noted that "we agree that Title III generates no right of access, but it is a non-sequitur to conclude the obverse: that Congress intended in [Title III], which relates solely to use in law-enforcement activities and judicial proceedings, to forbid public access by any other means on any other occasion." (*In re Application of Newsday, Inc.*).

In any case, the Seventh Circuit, in an unpublished opinion, eventually allowed press access to the wiretap recordings in the *Dorfman* case once they were presented in open court. (*Dorfman II*).

Wiretap materials in other court records.

Wiretap information is sometimes included in other court filings, such as warrant applications and pretrial motions. The *Newsday* court thus concluded that "the presence of material derived from intercepted communications in the warrant application does not change its status as a public document subject to a common law right of access, although the fact that the application contains such material may require careful review by a judge before the papers are unsealed." (*In re Application of Newsday, Inc.*.).

At the same time, the fact that wiretap materials were included in a court document does not make Title III considerations disappear. In one case, for example, prosecutors attached an affidavit to a search warrant application that included information collected from court-ordered wiretaps.

AP Photo
The news media won access to wiretap materials used in a pretrial hearing by lawyers for U.S. Rep. Mario Biaggi, convicted in a bribery investigation in 1988. Access to wiretaps and transcripts generally turns on whether they have been used as evidence in court.

The court, citing decisions from another appellate court, rejected the idea "that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure."

Thus, as with any wiretap materials that are incorporated into court documents subject to a presumption of access, "what is required is a careful balancing of the public's interest in access against the individual's privacy interests." In that case, the court did not disclose the materials because the government had not yet secured an indictment. But the court added that it did not mean to suggest that the media could not seek disclosure, "after indictment, of the wiretap information contained in the search warrant materials or other judicial documents." (*Certain Interested Individuals v. Pulitzer*).

In sum, most courts have found that wiretap materials, once discussed in testimony or filed in court, become court documents subject to a presumption of openness. Though the privacy interests that let to Title III are generally weighed against the public interest in access to wiretap materials (along with defendants' fair trial rights), most courts have rejected the idea that Title III bars the release of court documents that contain wiretap materials. ◆

Cases Cited

Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989)
Certain Interested Individuals v. Pulitzer, 895 F.2d 460 (8th Cir. 1990)
Commonwealth v. Fenstermaker, 515 Pa. 501 (1987)
Connecticut Practice Book §§ 36-2, 42-49A
Cottone v. Reno, 193 F.3d 550 (D.C. Cir. 1999)
Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.
In re Application and Affidavit for a Search Warrant, 923 F.2d 324 (4th Cir. 1991)
In re Application of Newsday, Inc., 895 F.2d 74 (2nd Cir. 1990)
In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984)
In re New York Times Co., 828 F.2d 110 (2nd Cir. 1987)
In re Search Warrant for Secretarial Area-Gunn, 855 F.2d 569 (8th Cir. 1988)
Media General Operations, Inc. v. Buchanan, 417 F.3d 424 (4th Cir. 2005)
State v. Clark, No. CR09-97102-T (Conn. Superior Court Nov. 6, 2009)
Times Mirror Co. v. U.S., 873 F.2d 1210 (9th Cir. 1989)
U.S. v. Dorfman (Dorfman I), 690 F.2d 1230 (7th Cir. 1982)
U.S. v. Dorfman (Dorfman II), 8 Media L. Rep. 2372 (7th Cir. Oct. 25, 1982)
U.S. v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985)

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