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## ACCESS TO TRIAL EXHIBITS IN CIVIL SUITS: IN re *REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS*

The first amendment to the Constitution provides that Congress shall enact no law that abridges either freedom of speech or freedom of the press.<sup>1</sup> First amendment rights, however, often extend beyond those expressly enumerated in the Constitution and encompass various interests through which the explicit constitutional rights can be exercised.<sup>2</sup> The Supreme Court has held that these derivative interests provide the press and the public with a presumptive right of access to criminal trials,<sup>3</sup> which has created an inference that this constitutional right should be extended to encompass the civil arena as well.<sup>4</sup> Access to judicial proceedings

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<sup>1</sup> U.S. CONST. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Id.*

<sup>2</sup> See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (right to receive information); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (right to privacy); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (right of association). Speaking for the Court in *Griswold*, Justice Douglas wrote that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484.

<sup>3</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). The Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment." *Id.*, (footnote omitted).

<sup>4</sup> See, e.g., *id.* at 599 (Stewart, J., concurring) (first amendment clearly gives press and public right of access to civil trials); Fenner & Koley, *Access to Judicial Proceedings: to Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430-32 (1981) (first amendment right of access applies to civil as well as criminal trials); *Constitutional Law—First Amendment—Right of Access to Civil Trials*: *Publicker Industries, Inc. v. Cohen*, 23 DUQ. L. REV. 1227, 1242 (1985) (right of access to civil trials should have constitutional protection).

Commentators have examined the scope of the right of access to judicial proceedings by examining the two considerations applied to define this right in *Richmond Newspapers*: current and historical practice, and public policy. See Fenner & Koley, *supra*, at 428. Both civil and criminal judicial proceedings have been described as historically open and public, see *id.* at 431, and the public policy benefits of open civil trials have been viewed to be similar to those in criminal proceedings. See *id.* at 432. Although the *Richmond Newspapers* decision produced seven opinions, the positions of a majority of justices have been described as supporting the extension of the right of access to civil proceedings. See *id.* at 430-31. *But*

raises the issue of access to judicial records, including trial exhibits.<sup>5</sup> Recently, however, in *In re Reporters Committee for Freedom of the Press*,<sup>6</sup> the Court of Appeals for the District of Columbia Circuit held that there is no constitutional right of contemporaneous access to trial exhibits in civil trials.<sup>7</sup>

In *Reporters Committee*, the Reporters Committee for Freedom of the Press and four individual reporters (the reporters) sought access to pretrial court records pertaining to a civil suit that involved the president of Mobil Oil Corporation, his son, and the Washington Post Company.<sup>8</sup> The district court issued a protective order surrounding the requested discovery documents,<sup>9</sup> which were

*cf. Bevier, Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 339-40 (1982) (arguing that reasoning of Justices in *Richmond Newspapers* gave rise to doctrinal confusion).

<sup>5</sup> See *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981). The *Criden* court discussed the presumptive common law right to inspect and copy judicial records, which is also referred to as the right of access. *Id.* This right is derived from both "the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records." *Id.* Trial exhibits, which may include documents introduced into evidence, are part of the judicial record and are thus subject to the public right of access. *United States v. Mitchell*, 551 F.2d 1252, 1259-60 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). Access to judicial records, including trial exhibits, is important because it protects the public's right to monitor the functioning of the judicial system. See *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985). Recently, first amendment protection has been extended to the right of access to court documents. See *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983).

<sup>6</sup> 773 F.2d 1325 (D.C. Cir. 1985).

<sup>7</sup> *Id.* at 1339.

<sup>8</sup> *Id.* at 1325-26. William Tavoulaareas, the president of Mobil Oil Corp., and his son, Peter, brought a libel suit against the Washington Post Co. (the Post) and several individuals connected with the Post. *Id.* They alleged that articles in *The Washington Post* suggested that William Tavoulaareas had used his influence to obtain for his son the position of partner in a London shipping firm. *Tavoulaareas v. Piro*, 93 F.R.D. 11, 13 (D.D.C. 1981). They further alleged that the suggestion was false and that the defendants either knew this or had reckless disregard for the truth or falsity of the statement. *Id.* The plaintiffs also sued Philip Piro, alleging that he made similar statements, again either with knowledge of their falsity or with reckless disregard for their truth or falsity. *Id.*

<sup>9</sup> *Reporters Committee*, 773 F.2d at 1326. The motion for a protective order was made pursuant to FED. R. CIV. P. 26(c), which provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense . . . .

*Id.* See generally C. WRIGHT, THE LAW OF FEDERAL COURTS § 83 (4th ed. 1983) (protective orders provide remedies against abuse of discovery).

The district court outlined a procedure by which Mobil could note the confidentiality of

filed to support cross-motions for summary judgment.<sup>10</sup> The order was based on the strength of a Mobil vice president's affidavit, which generally described the negative effect that the documents' release would have on the company.<sup>11</sup> Mobil later requested an extension of the protective order to documents introduced at trial as exhibits, and the district court granted the request without requiring Mobil to provide further justification for confidentiality.<sup>12</sup> At the conclusion of the trial,<sup>13</sup> Mobil waived most of its claims of confidentiality,<sup>14</sup> and the district court ordered that the remaining discovery documents and trial exhibits be unsealed.<sup>15</sup>

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a document. *Reporters Committee*, 773 F.2d at 1326. The Post would have an option to challenge Mobil's designation, either through an accommodation or, if necessary, a court ruling. *Id.* The Post opposed this procedure, arguing that it would be a prior restraint. *Id.* See *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979). The court ruled, however, that the order was a practical accommodation to the needs of the litigants. *Tavoulaareas v. Piro*, 93 F.R.D. at 30.

<sup>10</sup> *Reporters Committee*, 773 F.2d at 1326. The motions for summary judgment were denied. *Id.*

<sup>11</sup> *Id.* at 1326. The affidavit used to support the protective order claim generally stated that release of the documents would harm Mobil's business in Saudi Arabia and its competitive position in shipping. *Id.* It also stressed the impracticality of a one-by-one examination of the documents. *Id.* The Post characterized the allegations in the affidavit as "wholly conclusory and overly general," *Tavoulaareas v. Piro*, 93 F.R.D. 24, 29 (D.D.C. 1981), and argued that the affidavit failed to describe any specific or identifiable harm that would result from disclosure. *Id.* at 28. The court, however, ruled that the potential harm from disclosure of the sensitive corporate documents was sufficient to warrant the protective order. *Id.* at 29.

<sup>12</sup> *Tavoulaareas v. Piro*, 93 F.R.D. at 29. The only portions of trial exhibits that were to be made available to the press and public would be those portions read into evidence, or used to question or impeach witnesses. *Reporter's Committee*, 773 F.2d at 1327. Mobil designated fifty-two trial exhibits as confidential. *Id.*

The court noted that the continued sealing was "essential to the efficient and expeditious conduct of the trial." *Id.* (quoting *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387, slip op. at 4 (D.D.C. July 20, 1982)). The court agreed, however, to require Mobil to explain its reasons for confidentiality after trial. *Reporters Committee*, 773 F.2d at 1327.

<sup>13</sup> See *Reporters Committee* at 1327-28. After verdicts for William Tavoulaareas against the Post, for the Post against Peter Tavoulaareas, and for William and Peter Tavoulaareas against Philip Piro, the trial court granted judgments notwithstanding the verdict to all defendants. *Id.* In *Tavoulaareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia Circuit reversed the judgments n.o.v., holding that the evidence was sufficient to demonstrate that the article was published in reckless disregard for its falsity. *Id.* at 137. Subsequently, the District of Columbia Circuit ordered a rehearing of the cases *en banc*. *Tavoulaareas v. Piro*, 763 F.2d 1472, 1481 (D.C. Cir. 1985).

<sup>14</sup> *Reporters Committee* at 1328. Although Mobil originally designated fifty-two exhibits as confidential, after trial it only requested that eighteen remain protected. *Id.*

<sup>15</sup> *Id.* at 1328. Fourteen of the remaining trial exhibits were released because they either had never been subject to the protective order or because they were already available to the public. *Id.* Mobil waived its claim to three other exhibits, and the court unsealed the final exhibit because the justification for confidentiality was unsatisfactory. *Id.*

The reporters appealed the district court's order forbidding the disclosure of both pretrial discovery documents, and documents introduced as trial exhibits.<sup>16</sup> The court of appeals, after dealing with the threshold questions of mootness<sup>17</sup> and finality,<sup>18</sup> held that the district court could constitutionally refuse access to these materials until it issued a final judgment.<sup>19</sup>

Judge Scalia, writing for the majority, analyzed the protective order by questioning whether court records historically had been open, and whether access to court records played an essential role in the judicial process.<sup>20</sup> Although recognizing a tradition of conditional public access to such records,<sup>21</sup> the *Reporters Committee* court held that the right did not apply "until trial or judgment,"<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1328-30. Federal courts are limited to deciding cases or controversies. U.S. CONST. art. III, § 2, cl. 1. If a dispute is resolved, there is no longer a case or controversy. C. WRIGHT, *supra* note 9, at 55. In *Reporters Committee*, the documents in issue were released after trial. *Reporters Committee*, 773 F.2d at 1328. The court, however, decided the case because the event fell into the category of things "capable of repetition, yet evading review." *Id.* at 1328. (citation omitted) Under this doctrine, an otherwise moot claim can be brought if it was of too short a duration to be fully litigated before it became moot and if there is a reasonable expectation of another occurrence of the underlying event to the same party. C. WRIGHT, *supra* note 9, at 55; *see, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (restrictive order in completed murder trial could be imposed in second trial or in other trials). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 64-67 (2d ed. 1983) (orders that normally expire before review becomes available excepted from general rule against deciding moot questions).

<sup>18</sup> *Reporters Committee*, 773 F.2d at 1330. Under 28 U.S.C. § 1291 (1982), "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." *Id.* The rule barring review of non final decisions is generally followed, so that delay of litigation due to interlocutory appeals can be avoided. *See* C. WRIGHT, *supra* note 9, at 697-98. However, in some cases a court may review a "collateral order." *Id.* at 701. To be reviewable, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citation omitted). In *Reporters Committee*, the court held that the reporters' claim was reviewable because it was separate from, and collateral to, the merits of the underlying case. *Reporters Committee*, 773 F.2d at 1330.

<sup>19</sup> *Reporters Committee*, 773 F.2d at 1339.

<sup>20</sup> *Id.* at 1331-32. The court drew from the analysis of the constitutional right of access as it related to criminal trials in three previous Supreme Court cases. *Id.*; *see* *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507-511 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-73 (1980).

<sup>21</sup> *Reporters Committee*, 773 F.2d at 1333.

<sup>22</sup> *Id.* at 1336. The court put strong emphasis on two late nineteenth-century cases, *Cowley v. Pulsifer*, 137 Mass. 392 (1884), *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891), as support for the proposition that there was "no right of public access to pre-judgment records in civil cases." *Reporters Committee*, 773 F.2d at 1334. In his dissent, however,

at which time any policy considerations favoring an open trial would be satisfied.<sup>23</sup>

Judge Wright, dissenting in part,<sup>24</sup> contended that federal common law created a rebuttable presumption of contemporaneous access to designated trial exhibits.<sup>25</sup> To overcome this presumption, Judge Wright stated, Mobil should have been required to justify its request for a provisional seal for each document on an individual basis.<sup>26</sup> The dissent concluded by stating that a constitutional right of access was supported both historically<sup>27</sup> and by reasons of public policy.<sup>28</sup> Therefore, Judge Wright would have

Judge Wright argued that both *Schmedding* and *Cowley* dealt with a claim of access before trial, not before judgment. *Id.* at 1349-50 & n.17 (Wright, J., concurring and dissenting); see *Cowley*, 137 Mass. at 395; *Schmedding*, 85 Mich. at 2, 48 N.W. at 202; *Cowley*, 137 Mass. at 395.

<sup>23</sup> *Reporters Committee*, 773 F.2d at 1336-37. The court stated that access to civil trials is rarely requested and that a denial of access rarely results in public outcry. *Id.*

<sup>24</sup> *Id.* at 1341 (Wright, J., concurring and dissenting). Judge Wright concurred with the majority's holding that the reporters had no right of access to pretrial materials. *Id.* (Wright, J., concurring and dissenting). (the issue of access to pretrial discovery documents is beyond the scope of this Comment. Some federal courts have extended a right of access to pretrial exhibits in criminal cases. See, e.g., *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1146-47 (9th Cir. 1983) (closure order without showing of potential harm violated first amendment right); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43 & n.9 (C.D. Cal. 1984) (pretrial briefs and summary judgment documents presumptively open under common law); see also Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1851 (1984) (arguing for access to pretrial documents).

<sup>25</sup> *Reporters Committee*, 773 F.2d at 1345 (Wright, J., concurring and dissenting). Judge Wright considered timely access to trial documents necessary for "public understanding of judicial decisionmaking." *Id.* at 1342. The dissent cited several federal and state cases supporting the conditional common law right of access before judgment. *Id.* at 1342-43 (Wright, J., concurring and dissenting); see also *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("long-recognized presumption in favor of public access to judicial records"); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (open courtroom fundamental to American judicial system), *cert. denied*, 465 U.S. 1100 (1984); *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So. 2d 777, 784 (Fla. Dist. Ct. App. 1975) (public has conditional right of access in divorce proceedings).

<sup>26</sup> *Reporters Committee*, 773 F.2d at 1345-46 (Wright, J., concurring and dissenting).

<sup>27</sup> *Id.* at 1348-51 (Wright, J., concurring and dissenting). The dissent argued that the right of access to trial exhibits arose when the exhibits were introduced at trial, countering the majority's contention that the right did not attach before judgment. *Id.* at 1348 (Wright, J., concurring and dissenting). Judge Wright distinguished the support cited by the majority as caselaw dealing with access to pretrial documents rather than not trial exhibits. *Id.* at 1348-49 (Wright, J., concurring and dissenting); see *supra* note 22.

<sup>28</sup> *Id.* at 1351-53 (Wright, J., concurring and dissenting). The dissent discussed the important functions that open trials serve, including facilitating fact finding, fairness, and legitimacy in judicial proceedings. *Id.* at 1351 (Wright, J., concurring and dissenting). Judge Wright also stressed the important public interest in contemporaneous access, rather than access to a transcript after judgment. *Id.* at 1352-53 (Wright, J., concurring and dissenting).

reversed the district court's decision to extend the terms of its protective order to the documents used as trial exhibits.<sup>29</sup>

The *Reporters Committee* decision conflicts with decisions in several other circuits recognizing a constitutional right of access to civil trials.<sup>30</sup> It is submitted that federal common law and the first amendment grant the press and public a presumptive right of access to civil trials and to civil trial exhibits. It is further submitted that in *Reporters Committee*, the extension of the provisional seal was justified and the reporters were properly heard on the issue of access. This Comment will address the common law and constitutional rights of access, and will conclude by proposing a standard for the application of these rights.

### THE COMMON LAW RIGHT OF ACCESS

Federal courts have consistently recognized a presumptive common law right of access to judicial proceedings and records.<sup>31</sup>

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He reasoned that the danger was not the possibility of distortion, but rather, the suppression of information through delay. *Id.* at 1353 (Wright, J., concurring and dissenting).

<sup>29</sup> *Id.* at 1346, 1356 (Wright, J., concurring and dissenting). Judge Wright proposed two requirements for the granting of a provisional seal: the presence of a substantial government interest, and the absence of a less restrictive remedy. *Id.* at 1354 (Wright, J., concurring and dissenting). Judge Wright stated that the need to avoid undue delay in litigation could be a sufficient reason for the imposition of a provisional seal under this analysis. *Id.* at 1335. (Wright, J., concurring and dissenting). He added, however, that the requirement of a less restrictive means analysis would guard against the use of delay as an excuse for imposing a provisional seal at any time. *Id.* (Wright, J., concurring and dissenting).

<sup>30</sup> See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (recognizing conditional first amendment right of access); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983) (applying first amendment right of access to partly civil and partly criminal contempt hearing); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) (Supreme Court analysis of first amendment access to criminal trials applies to civil trials), *cert. denied*, 465 U.S. 1100 (1984).

In *Publicker*, the trial court closed hearings on motions for a preliminary injunction because of the confidential information involved. 773 F.2d at 1062-63. Portions of the transcripts of the hearing were sealed without explanation. *Id.* at 1064. The Court of Appeals for the Third Circuit held that the press and the public possess a presumptive right of access to civil proceedings, based upon common law and the first amendment. *Id.* at 1071. The court reversed the trial court's ruling on the grounds that the closure order had been too broad in scope and that the sealing of the transcripts had been done without an articulation of findings. *Id.* at 1074.

<sup>31</sup> See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981). In *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), the court wrote that "[t]he existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute." *Id.* at 1066. The common law right is not absolute, but it has been described as being important to the preservation of

This right extends to documents introduced as trial exhibits because the documents become part of the judicial record.<sup>32</sup> Although the *Reporters Committee* majority recognized a "tradition of public access,"<sup>33</sup> it refused to rest its decision on federal common law<sup>34</sup> and instead examined the traditional right of access solely through analysis of the first amendment.<sup>35</sup>

The common law right of access to trials and trial exhibits is conditional.<sup>36</sup> If the content of the information sought is claimed to be confidential, sensitive, or privileged, a court may be justified in restricting access to the trial or to court records.<sup>37</sup> In this manner,

integrity of law enforcement and the judicial processes. *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

<sup>32</sup> See *United States v. Mitchell*, 551 F.2d 1252, 1259-60 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978).

<sup>33</sup> *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1333 (D.C. Cir. 1985).

<sup>34</sup> *Id.* at 1340 (Wright, J., concurring and dissenting). Judge Wright argued that the case should have been disposed of through a reliance on federal common law, without reaching the constitutional question. *Id.* Concurring in *Ashwander v. TVA*, 297 U.S. 288 (1936), Justice Brandeis wrote that if a court could decide a case on both constitutional grounds and general law, it should rely on general law. *Id.* at 347 (Brandeis, J., concurring). This policy is followed because of the serious consequences that may result from unnecessary resolution of constitutional questions. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 571-72 (1947).

The *Reporters Committee* majority, however, stressed that only the constitutional issue was raised, presumably because the appellants believed that federal common law would not support their position. *Reporters Committee*, 773 F.2d at 1330. Other federal courts that have decided the issue of access have also addressed the first amendment question. See, e.g., *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1067 (3d Cir. 1984). Judge Wright would have required the parties to submit supplemental briefs on the common law issue. *Reporters Committee*, 773 F.2d at 1342 (Wright, J., concurring and dissenting).

<sup>35</sup> *Reporters Committee*, 773 F.2d at 1332-36.

<sup>36</sup> See, e.g., *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) ("right to inspect and copy judicial records is not absolute"); *In re Caswell*, 18 R.I. 835, 835, 29 A. 259, 259 (1893) (cannot exercise right out of curiosity or to create scandal); see also Note, *supra* note 24, at 1825-26 (presumption of openness tempered by discretion of trial judge and facts of case).

<sup>37</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 714-16 (1974) (recognizing confidential nature of Presidential communication); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983) (substantial damage to property rights in trade secrets justified closure); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 907 (E.D. Pa. 1981) (sensitive commercial information was sufficient for sealing of documents).

The conflicting interests that may be sufficient to rebut the conditional right of access include protection of national security, trade secrets, juveniles, and privacy. Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286, 299-313 (1984). The interests of the public in fair trials and informed debate must be balanced against the interests of litigants in a fair trial, privacy, and secrecy. Note, *After Richmond Newspapers: A Public Right to Attend Civil Trials?*, 4 COMM/ENT L.J. 291, 300-15 (1982).



the proponents of the provisional seal in *Reporters Committee* claimed that confidentiality was necessary to protect their commercial interests.<sup>38</sup> Thus, the decision as to whether a claim is sufficient to rebut the presumptive common law right of access is a matter of judicial discretion, subject to appellate review for abuse.<sup>39</sup>

### THE CONSTITUTIONAL ISSUE

Rather than rely on common law, however, the appellants in *Reporters Committee* raised the constitutional issue of whether the first amendment gave the press and the public a right of access to civil trials and a right to inspect and copy judicial records.<sup>40</sup> In *Richmond Newspapers, Inc. v. Virginia*,<sup>41</sup> the Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."<sup>42</sup> The Court ruled that a criminal trial must be open unless the trial court could articulate an overriding interest in secrecy.<sup>43</sup> The determination of whether a constitutional right of access applied to civil trials and trial exhibits would be guided by the two factors that the *Richmond Newspapers* plurality examined:<sup>44</sup> whether access was historically rooted and whether it played an important role in the judicial process.<sup>45</sup>

<sup>38</sup> *Reporters Committee*, 773 F.2d at 1326; see *supra* note 11.

<sup>39</sup> *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). For a general discussion of judicial discretion, see Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636-650 (1971).

<sup>40</sup> *Reporters Committee*, 773 F.2d at 1330. See *supra* note 34.

<sup>41</sup> 448 U.S. 555 (1980).

<sup>42</sup> *Id.* at 580. The defendant in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), had been convicted of murdering a hotel manager. *Id.* at 559. The conviction was reversed and the second trial ended in a mistrial. *Id.* The third trial also ended in a mistrial, possibly because the jurors had learned of the previous trials. *Id.* At the fourth trial, the defendant asked that the trial be closed to the public, and the prosecutor did not object to the motion. *Id.* at 559-60. The trial judge granted the request, relying on VA. CODE § 19.2-266 (Supp. 1980), which allows trial courts discretion to close trials. *Richmond Newspapers*, 448 U.S. at 560. *Richmond Newspapers* sought a hearing on a motion to vacate the order. *Id.* The court denied the motion to vacate, and the trial was closed to the press and to the public. *Id.* at 561.

<sup>43</sup> *Richmond Newspapers*, 448 U.S. at 580-81.

<sup>44</sup> See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1067-68 (3d Cir. 1984) (applying *Richmond Newspapers* analysis to issue of access to civil trials); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983) (historical and philosophical analysis of right of access in civil trials); *Fenner & Koley*, *supra* note 4, at 430 (*Richmond Newspapers* analysis supports extension of right to civil trials).

<sup>45</sup> *Richmond Newspapers*, 448 U.S. at 564-69. The plurality opinion traced the historic

In *Richmond Newspapers*, the Court noted that historically, civil and criminal trials always had been presumptively open.<sup>46</sup> At common law in England, all judicial trials were held in open court.<sup>47</sup> Later, in eighteenth-century America, some colonies specifically required open civil trials.<sup>48</sup> As modern case law developed, courts adhered to this historic tradition of access.<sup>49</sup> A right of access to trial exhibits would attach when the exhibits are introduced at trial, because that is when they become part of the trial.<sup>50</sup>

Under the *Richmond Newspapers* analysis, however, access to trials and judicial records can be barred if it is not vital to the judicial process.<sup>51</sup> Although *Richmond Newspapers* involved a criminal trial, this threshold can be met in civil actions as well,

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openness of criminal trials at common law in England, *id.* at 565-67, and illustrated the historic evidence of the open criminal trial in colonial America. *Id.* at 567-69. The Court also described presumptive openness as "an indispensable attribute of an Anglo-American trial." *Id.* at 569. The Court cited the need for public acceptance of the process of justice and its results. *Id.* at 571. Open criminal trials, the Court wrote, serve a "community therapeutic value" by providing an outlet for the feelings of emotion and protest. *Id.* at 570-71. In addition, they provide an appearance of justice and an education for the public. *Id.* at 571-72. These needs are satisfied by open criminal trials, the Court wrote, because "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572.

<sup>46</sup> *Id.* at 580 n.17.

<sup>47</sup> See *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) (quoting E. JENCKS, *THE BOOK OF ENGLISH LAW 73-74* (6th ed. 1967)); A. KIRALFY, *THE ENGLISH LEGAL SYSTEM* 247 (4th ed. 1967).

<sup>48</sup> See 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 129, 271 (1971). West New Jersey and Pennsylvania both required open courts, civil and criminal. *Id.* Other colonies, however, specified open trials only in criminal cases. *Id.* at 323-24, 371-72. However, these colonies may have been protecting the rights of the accused rather than freedom of speech and of the press. Cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 385-86 (1979) (sixth amendment gives accused right to demand public trial).

<sup>49</sup> See, e.g., *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) (recognition of common law right of access); *Nowack v. Fuller*, 243 Mich. 200, 201, 219 N.W. 749, 750 (1928) (right was based on interest of citizen in the record); *In re Caswell*, 18 R.I. 835, 835, 29 A. 259, 259 (1893) (right applies to one who acts as representative of public).

<sup>50</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 394-97 (1979) (Burger, C.J., concurring). Chief Justice Burger distinguished between a trial and a pretrial hearing, suggesting that the timing of a proceeding would be significant in determining public access. *Id.* at 394-95 (Burger, C.J., concurring). The Chief Justice stated that pretrial materials would be subject to publicity when they became part of the trial, i.e., the time at which they are offered into evidence. *Id.* at 396 (Burger, C.J., concurring); see also *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43 n.9 (C.D. Cal. 1984) (common law right of access attached to pretrial briefs and summary judgment materials when submitted to court); Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 *TEMPLE L. REV.* 311, 337-38 (1979) (right of access to judicial records is coextensive with right to public trial).

<sup>51</sup> *Richmond Newspapers*, 448 U.S. at 569-73 (1980); see *supra* notes 45 & 46.

because many civil trials involve issues that are as important to the public as those in criminal cases.<sup>52</sup> When civil trials involve serious social and economic issues, public access is a necessary precondition to public confidence in the administration of justice.<sup>53</sup> Indeed, public access to civil trials and to judicial records has been described as "fundamental to a democratic state,"<sup>54</sup> serving as both a check on public officials, and as a means of aiding the efficient administration of justice.<sup>55</sup> Although the press has no greater right of access than the public generally,<sup>56</sup> the press serves as the disseminator of information through which the public can judge the proper functioning of the courts.<sup>57</sup> Because civil trials were histori-

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<sup>52</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 386-87 n.15 (1979). The *Gannett* Court noted that the public interest in access to judicial proceedings may be stronger in a civil case than in a criminal case, citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) which decided that black slaves were not citizens, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which held that racial segregation in schools was a denial of equal protection, and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), which examined racial quotas and affirmative action programs. *Gannett*, 443 U.S. at 386-87 n.15.

Although the issue of public access to trials has been addressed by the Supreme Court only in criminal cases, policy justifications for access to criminal trials apply to civil trials as well. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). In *Brown & Williamson*, the court noted that because civil litigation often affects third parties and the general public, public access serves as a check on judicial administration, and aids in accurate fact-finding. *See Id.*; *see also United States v. Cianfrani*, 573 F.2d 835, 862 (3d Cir. 1978) (Gibbons, J., concurring) (political issues decided in civil cases may have greater impact than legislation).

<sup>53</sup> *See, e.g., Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (court should consider public confidence in shareholder derivative suit), *cert. denied*, 460 U.S. 1051 (1983). In *Joy*, the Court of Appeals for the Second Circuit discussed the danger of routinely dismissing shareholders derivative suits on the basis of secret documents. *Id.* The court stressed the need for shareholders to have confidence that their interests were being protected and recommended a balancing of these interests before imposing a seal. *Id.*

<sup>54</sup> *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

<sup>55</sup> *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592-97 (1980) (Brennan, J., concurring). With regard to criminal trials, Justice Brennan stated that public access was one of the "checks and balances" on judicial abuse. *Id.* at 596 (Brennan, J., concurring). He observed that open trials also have a "structural significance" in assuring fair adjudication, *id.* at 593-94 (Brennan, J., concurring), making access "an indispensable element of the trial process itself." *Id.* at 597 (Brennan, J., concurring). *See also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) (public scrutiny and discussion forces judges to be responsible for rulings), *cert. denied*, 464 U.S. 1100 (1984); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (those administering justice must act under public eye and sense of public responsibility).

<sup>56</sup> *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

<sup>57</sup> *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The press plays a special role in conveying information to the public regarding the functioning of the courts. *See Comment, supra* note 37, at 347. It educates the public about judicial proceedings and

cally open and because they possess an essential role in the judicial process, it is submitted that the press and the public enjoy a presumptive right of access to civil trials and trial exhibits, a right guaranteed by the first amendment.

#### A PROCEDURAL STANDARD

Both the common law and the constitutional right of access are conditional; thus, a trial court may close judicial proceedings or seal judicial records if there is sufficient justification.<sup>58</sup> Under common law, the decision to permit access is within the discretion of the trial court.<sup>59</sup> To safeguard the first amendment right of access of the public and the press, however, this discretionary decision should be guided by substantive and procedural standards.<sup>60</sup>

The Supreme Court has set forth a substantive rule for the closing of criminal trials in *Globe Newspaper Co. v. Superior Court*.<sup>61</sup> The Court stated that denial of access to a criminal trial must be "necessitated by a compelling governmental interest"<sup>62</sup>

serves as a "watchdog of the courts." *Id.*

In a 1979 address, Justice Brennan remarked that "the First Amendment protects the structure of communications necessary for the existence of our democracy." Address by William J. Brennan, Jr., 32 *RUTGERS L. REV.* 173, 176 (1979). Justice Brennan would extend "unique First Amendment protection" to the press when it performs those activities involved in gathering and disseminating the news. *Id.* at 177. Justice Brennan also expressed this view in his concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), when he wrote that "the First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government," *id.* at 587 (Brennan, J., concurring) (emphasis original).

<sup>58</sup> See *supra* notes 36-37 and accompanying text.

<sup>59</sup> *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). See *supra* note 39.

<sup>60</sup> See *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); see also Note, *Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts*, 58 *TEMP. L. Q.* 159, 169 (1985) (courts beginning to determine substantive justifications and procedural rules for restrictions on access).

<sup>61</sup> 457 U.S. 596 (1982). *Globe* involved a Massachusetts statute that mandated closure of a trial during the testimony of a minor sex-offense victim. *Id.* at 598. The Court held that a statute could not constitutionally mandate closure, although the interests in a specific case might be sufficient to require closure. *Id.* at 607-08.

<sup>62</sup> *Id.* at 607. Several courts have used language similar to that of *Globe* in defining the governmental interest that may overcome the presumption of access. See, e.g., *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) ("exceptional circumstances"); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984) (important "countervailing interest"); *In re Nat'l Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980) ("most extraordinary circumstances"). In his dissent in *Reporters Committee*, Judge Wright noted that the standard may not be as strict in a civil trial as in a criminal trial. *In re Reporters*

and "narrowly tailored to serve that interest."<sup>63</sup> Similarly, in a civil trial, a court should balance the interests of the parties to decide whether the right of access is paramount or whether it has been overcome by a substantial, narrowly drawn governmental interest.<sup>64</sup>

Because it is difficult to define situations in which substantial interests would necessitate the closing of a trial or the sealing of records, the balancing process is necessarily discretionary.<sup>65</sup> To provide an appellate court with an adequate basis for review, however, a trial court should demonstrate the reasons for its decision with specificity.<sup>66</sup> In addition, the trial court should consider all

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Comm. for Freedom of the Press, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (Wright, J., concurring and dissenting).

<sup>63</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Courts recognizing a first amendment right of access have required that any limitation on access be the least restrictive way to advance the governmental interest being protected. See *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). To the extent that public interest in access and the private interest in nondisclosure are both strong, a court might satisfy both interests through partial or redacted disclosure of trial exhibit documents. See, e.g., *United States v. Hubbard*, 650 F.2d 293, 324-325 (D.C. Cir. 1980) (trial court may permit partial disclosure of documents).

<sup>64</sup> See *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1313-16 (7th Cir. 1984). In *Continental Illinois*, a report on litigation of derivative claims was admitted into evidence, *id.* at 1304-05, and the trial judge ordered the report to be open. *Id.* at 1306-07. The Court of Appeals for the Seventh Circuit held that a presumption of access applied to the report, which was used in connection with a motion to terminate. *Id.* at 1309. The court balanced the interests of the public in understanding disputes and assuring a fair judicial system, *id.* at 1314, with the attorney-client privilege and need for confidentiality. *Id.* The court found that the private interests did not outweigh the right of access, especially since parts of the report were admitted into evidence. *Id.* at 1314-16. See generally Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 446-54 (1980) (examining how Burger Court balances first amendment protections).

<sup>65</sup> *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). The decision of a trial court to close a trial or seal records would be subject to review only for abuse of discretion. See *id.*; *supra* note 39.

<sup>66</sup> See *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984). In *Publicker*, the court held that the trial court had abused its discretion by issuing an order of confidentiality without explaining its rationale. *Id.* The court refused to speculate regarding whether the rationale of the trial court was correct. *Id.* The court stressed that the record did not "provide a firm base for an appellate judgment that discretion was soundly exercised." *Id.* (quoting *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981)). The decision in *Richmond Newspapers* also supports the requirement of articulated findings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980); but see *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1313 (7th Cir. 1984). The *Continental Illinois* court held that appellate review was not precluded by a failure of the trial court to articulate findings. *Id.* The court suggested, however, that express findings would be desirable in the future. *Id.*

alternatives, so that any denial of access is "narrowly tailored."<sup>67</sup> Finally, third parties should have an opportunity to be heard so that they may challenge any denial of access.<sup>68</sup>

In *Reporters Committee*, the trial court extended the pretrial protective order to documents used as trial exhibits without requiring further justification.<sup>69</sup> The restriction was narrow because portions of protected documents that were used to question or impeach witnesses, or read into evidence, were made available to the press and the public in the transcript.<sup>70</sup> The reporters were given a hearing, but the district court found the sealing of these documents to be "essential to the efficient and expeditious conduct of the trial."<sup>71</sup> It is submitted that although the court of appeals should have recognized the common law and constitutional right of access, the trial court's extension of the pretrial protective order to trial exhibits was a narrow accommodation of the needs of the litigation and did not unduly infringe upon the public access rights of the reporters.

### CONCLUSION

Civil trials involve issues that may profoundly affect the general public. Courts should recognize that the public and the press have a presumptive right of access to civil trials and to civil trial exhibits, a right derived from both federal common law and the first amendment. While a narrowly tailored, substantial interest may overcome these rights, a trial court must consider the compet-

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<sup>67</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), an order closing a *voir dire* proceeding was vacated because the trial judge failed to articulate findings. *Id.* at 513; see also *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) (trial court failed to consider less restrictive alternative of bifurcated hearing before closure).

<sup>68</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring). Justice Powell wrote that "[i]f the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion." *Id.* at 401 (Powell, J., concurring); see also *United States v. Brooklier*, 685 F.2d 1162, 1173 (9th Cir. 1982) (newspaper had right to be heard before exclusion in criminal trial).

<sup>69</sup> *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C. Cir. 1985); see *supra* notes 11 & 12. The order was subject to the original pretrial limitations, including the litigants' option to challenge confidentiality designations. *Reporters Committee*, 773 F.2d at 1326; see *supra* note 9.

<sup>70</sup> *Reporters Committee*, 773 F.2d at 1326-27.

<sup>71</sup> *Id.* at 1327 (quoting *Tavoulareas v. Washington Post Co.*, Nos. 80-3032 & 80-2387, slip op. at 4 (D.D.C. July 20, 1982)).

ing interests with reasoned discretion. In this way, the courts will safeguard the rights of litigants and the public.

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