FIRST AMENDMENT WATCH AT NEW YORK UNIVERSITY

FIRST AMENDMENT COALITION

TEACHERS GUIDE

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Access to Courts and Court Records

By David L. Hudson, Jr.

The buliding of the U.S. Supreme Court is pictured in Washington, D.C., U.S., January 19, 2020. REUTERS/Will Dunham

"A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."
— James Madison, 1822

Public access to the judicial system is a necessary element in a constitutional democracy. The idea behind "We the People"—the notion that the people are sovereign—assumes that the people govern their institutions. For the judicial system, that means the public and press must be able to attend proceedings and access records used to determine consequential moments in people's lives. The Supreme Court has said that this right to access our courts is protected, with important exceptions, by the First Amendment.

Tension between secrecy and openness in U.S. courts plays out regularly across the country. Concerns that may overcome the First Amendment right of access include criminal defendants' constitutional rights to a fair trial, the special need of privacy in juvenile court proceedings, and companies' interests in protecting trade secrets. There are narrow exceptions that may allow for closure of courtrooms or sealing of records, but the default position in a free society has to be open access. The First Amendment demands that the public see how governmental institutions operate.

The COVID-19 pandemic has thrown into sharp relief the tension between secrecy and openness in courts. Across the country, courts have closed down all or most physical access to courts, while sometimes still conducting proceedings with lawyers and court personnel present—but no public or press. This has raised serious concerns about widespread court secrecy. Some courts have resolved this problem by providing access by phone or video link, and others have simply put a halt to many court proceedings altogether. But the need to access courts—to oversee what the judiciary is doing—has not gone away. Nor has the fundamental right to this access.

The public needs access to the courts and court records to understand the system and how it works. The press needs the same access in order to be able to report to society about how well or poorly the judicial system is functioning in their communities. This teachers guide discusses access to courts, including how court access is faring during the COVID-19 crisis; the development of access to criminal trials; the importance of both the First Amendment right of access and the Sixth Amendment right to a public trial; the clash between the First Amendment and the Sixth Amendment concerns over a fair trial; the qualified right of access to civil court proceedings; the dangers of "secret justice"; and cameras in the courts.

Objectives

- Describe how the pandemic has affected court access.
- Describe the development of public access to criminal court proceedings.
- Understand the Sixth Amendment right to a public trial.
- Explain why the First Amendment right to a free press can sometimes clash with the Sixth Amendment right to a fair trial.
- Discuss the development of public access to civil court proceedings.
- Discuss the dangerous phenomenon of secret justice.
- Identify issues related to the use of cameras in the courtroom.

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FIRST AMENDMENT WATCH AT NEW YORK UNIVERSITY documents threats to constitutionally protected freedoms of speech, press, assembly, and petition—rights that are critical to self-governance.

COVID-19 Crisis and Court Access

The COVID-19 pandemic has threatened vital court access for millions of people in the United States. Many courthouse buildings were closed during the spring, summer, and fall of 2020. For individuals directly involved in judicial proceedings—such as criminal defendants or civil litigants—these closures have resulted in, at a minimum, delays in access to justice. For example, in December 2020, *The New York Times* reported that only nine jury trials had taken place in nine months in federal and state courts in New York City. In Ashland County, Ohio, a jury trial ended dramatically in April 2020, when a criminal defendant and his attorney showed coronavirus symptoms, leading to the defendant being hospitalized.

But there is another aspect of access to the judiciary that has been disrupted by the pandemic: the right of the public and press to access proceedings that are actually going forward. In jurisdictions where proceedings are happening despite the widespread pandemic closures, some courts have severely limited who can attend in-person proceedings. And while some jurisdictions have remedied this problem by allowing public access via telephone or remote video access, some courts have failed to adequately provide for public access during this difficult time. In Kern County, California, the state court system repeatedly excluded family members from attending either in-person or remote criminal trials or other proceedings involving their relatives.

The First Amendment Coalition, among others, challenged these denials of access in federal court in *American Civil Liberties Union of Southern California v. Harber-Pickens* (2020). In their motion for a temporary restraining order, the plaintiffs argued that the public's First Amendment right of access to court proceedings had been violated, and that "[p]ublic access is particularly important now given the long overdue focus on the disparate treatment of Black and Brown people by the criminal legal system." Fortunately, the Kern County Superior Court later rescinded its ban on persons entering the courthouse, issuing a new court order that allows a limited number of persons to enter pursuant to public health guidelines.

Kern County is not unique. Other courts have barred family members from attending court proceedings. Deborah Fisher, executive director of the Tennessee Coalition for Open Government, confirmed that family members were turned away from the Justice A.A. Birch Building in Nashville, Tennessee, which is home

to the criminal courts in the area. In one instance, a grandmother was prevented from testifying as a character witness for her grandson in his criminal case.

Dealing with court access during the COVID-19 pandemic remains a work in progress. It also remains unclear whether remote court technology will remain a staple of the court system once the pandemic ends.

Discussion Questions

1. A community has suffered an increase in its COVID-19 numbers, as more persons have tested positive for the virus. Two court personnel have testified positive for the virus in the past few months. As a result, the court administrator issues a blanket rule, prohibiting in-court hearings unless it qualifies as an "emergency"—such as a necessary bond hearing or a domestic violence proceeding. This not only pushes back the hearing dates for numerous litigants but also prohibits any family members or visitors from accessing the court proceedings. Do you see problems with such a blanket order, or is it a necessary response during an emergency?

2. Professor Stephen Smith has argued, in his law review article "The Right to a Public Trial in the Time of Covid-19," that "protecting public health" is an overriding interest that trumps the right to a public trial. Do you agree with this assessment, or do you believe that courts must still come up with ways to ensure public access to court proceedings in some fashion? Are there ways that technology can help provide a level of access that addresses both concerns?

Decoding Court Proceedings and Records Terminology

Few people are familiar with the terms and definitions used in court proceedings or to describe court records. Below is a list of court-related terms, and whether the proceeding or record is available to the general public.

Court Proceeding	*What is it?*	*Is it open to the public?*
Voir dire	Voir dire is a jury selection process to determine if potential jurors might be biased against the defendant or had been exposed to pretrial publicity.	Voir dire is open to the public, but in rare cases, a judge may close the proceedings if there is a threat of improper communications or safety concerns.
Grand jury	A grand jury is sometimes convened to determine if charges should be brought against a subject.	Grand jury proceedings are always closed to the public.
Trial jury deliberations	Trial jury deliberations are when jurors decide if a defendant is guilty or liable, or not.	Trial jury deliberations are always conducted in private.

Court Proceeding	*What is it?*	*Is it open to the public?*
Criminal trials	A criminal trial occurs when someone is accused of committing a crime. Criminal cases typically allow for a trial by jury.	Criminal trials are generally open to the public, though a court can make an exception based on a defendant's Sixth Amendment right. To close a trial or portions of it, a trial judge must conclude (1) that opening the courtroom to the public would have a "substantial probability" of negatively impacting a defendant's right to a fair trial, and (2) that reasonable alternatives to closing the courtroom could not adequately protect the defendant's fair trial rights.
Civil trials	A civil trial typically involves a conflict between two individuals over the legal duties owed to each other.	Although the Supreme Court has never ruled that civil trials have to be open to the public, numerous lower courts at both the state and federal level have. Civil proceedings can be closed for such reasons as the need to protect the parties' privacy, trade secrets, or other confidential business information.
Juvenile proceedings	A proceeding involving an individual who is not considered old enough to be held responsible for criminal acts.	Juvenile proceedings are typically closed to the public, but the laws vary state by state. For instance, in Utah, felony criminal cases for juveniles 14 and older are presumed open to the public. And in Minnesota, most juvenile proceedings are closed to the public, except for serious crimes committed by children over the age of 16.

Court Proceeding	*What is it?*	*Is it open to the public?*
Family court proceedings	A proceeding that deals with family law, such as divorce and child custody.	Family court proceedings are generally open to the public, except for cases involving minors over such issues as legal guardianship and adoption.
Suppression hearings	A hearing where the criminal defendant argues that certain evidence must be excluded from trial, often because it was collected by police unlawfully.	Suppression hearings are typically open to the public.
Settlement conferences	A settlement conference in a civil or criminal proceeding takes place before a neutral party (judge, magistrate, other facilitator) to facilitate resolution of a case.	Settlement conferences are not open to the public. However, a record of the settlement conference taking place is typically noted on public dockets/ register of actions.

Records

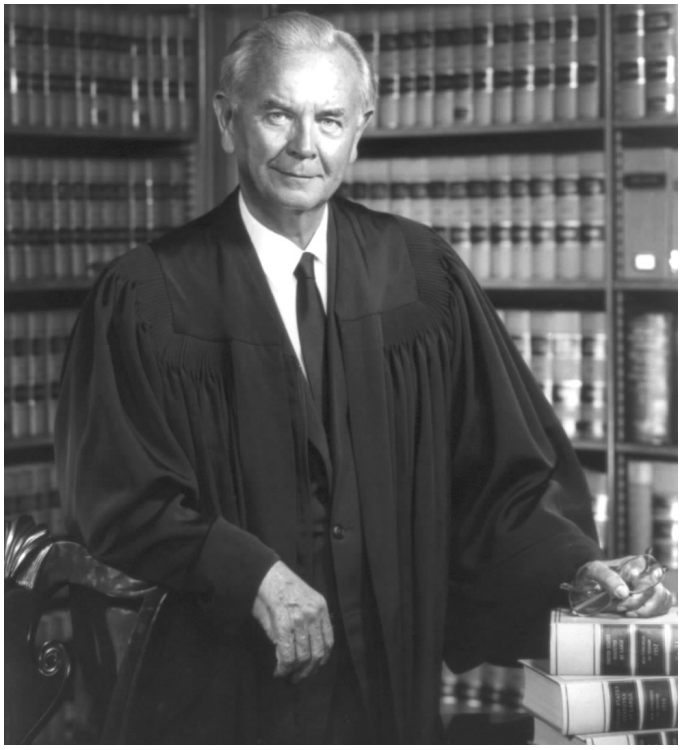
Category of Court Record	*Common names*	*Can the public access the records?*
Records initiating criminal and civil cases	Criminal cases begin with charging papers, which are typically called a complaint. Civil cases, i.e., lawsuits, generally begin with a record, called a complaint or petition, and are often responded to with an answer, cross-claims, or papers to throw out the case on the basis of fact or law.	Yes, but sometimes there is a question of timing. Criminal charging papers are sometimes placed under seal for brief periods of time to allow law enforcement to make arrests or conduct other aspects of an investigation.

Category of Court Record	*Common names*	*Can the public access the records?*
Records filed with the court by a party during an ongoing case or after verdict or other resolution	Motions and other documents are filed throughout the life of a case. Some examples include: motions for emergency relief (such as temporary restraining orders or preliminary injunctions); motions to end a case or reduce the number of claims or charges (motion to dismiss or motion for summary judgment); motions to prevent the introduction of certain evidence (motions in limine or motions to suppress); and motions for a new trial.	Yes. In some circumstances, one party to a criminal or civil action will seek to file all or part of a motion under seal, and the law in different regions and rules of various courts govern what kind of showing the party must make to keep it out of public light temporarily or permanently.
Records filed by parties in the appellate courts	At the appellate courts, court records called briefs are filed by all sides making their legal arguments on why a lower court ruling should be upheld or overturned.	Yes.
Records filed by the court	Orders, opinions, or rulings from the bench (verbal with only notations on the docket or available via transcripts).	Yes.
Transcripts, trial exhibits, demonstratives	Transcripts are written records of court proceedings; trial exhibits are the evidence used or not used in bench or jury trials; and demonstratives are visual displays shown to jurors or judges during proceedings.	Transcripts are available to the public but can be costly. Trial exhibits are open to the public with some exceptions. Public access to demonstratives can vary quite a bit by court and jurisdiction.

Public Access to Criminal Court Proceedings

The U.S. Supreme Court declared in *Richmond Newspapers, Inc. v. Virginia* (1980) that criminal trials are presumptively open to the public absent a compelling interest for closing them. Chief Justice Warren Burger wrote in his plurality opinion that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."

The Court rooted this presumptive right of access in both the common law tradition from England and the First Amendment. In *Richmond Newspapers*, the Court explained that historically in England and in the colonies, criminal trials were open to the public. There was plenty of evidence to support the history and tradition analysis. Second, the Court also noted that open criminal trials provide public support for the criminal justice system. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing," Chief Justice Burger wrote. "When a criminal trial that is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case."



Official portraits of the 1976 U.S. Supreme Court: Justice William J. Brennan Jr. Color negative by Robert S. Oakes. Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA

In his concurring opinion in *Richmond Newspapers*, Justice William Brennan suggested a two-part test future judges could use to determine whether a court proceeding should be open to the public. Often referred to as the "experience and logic test," Brennan's solution has judges first ask whether a particular court proceeding has a documented history of being open to the press and general public. Next, the judge considers whether public access plays a positive role in the functioning of the court process. The U.S. Supreme Court officially adopted Justice Brennan's two-part test in *Globe Newspaper Co. v. Superior Court* (1982).

The Supreme Court has used the "experience and logic test" to determine in 1986 whether a preliminary hearing in a criminal case should be open to the public. In *Press-Enterprise Co. v. Superior Court* (1986), the court explained that since the time of Aaron Burr, "the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court." The Court elaborated that preliminary hearings—where a defendant can appear, be represented by an attorney, cross-examine hostile witnesses, and present exculpatory evidence—is "often the final and most important step in the criminal proceeding." The openness of a preliminary hearing ensures to the public that justice is being conducted fairly and impartially.

Not all aspects of the criminal process are open to the public. A classic example are grand jury proceedings, which are held in private. This allows prosecutors to present evidence to a larger pool of jurors to determine whether there is sufficient evidence to move forward with a criminal prosecution. Grand jury proceedings are kept secret for a number of reasons: The secrecy encourages prospective witnesses to come forward without fear that the person they are testifying against will find out or retaliate against them, it keeps people about to be indicted from fleeing, and it protects those who are accused, but not indicted, from public ridicule.

Discussion Questions

1. There is a history of open criminal trials in this country. Discuss why it is important for the public to have access to criminal trials. What is wrong with the concept of secret justice?
2. In some criminal cases, such as the trials of alleged defendants with significant ties to organized crime, a few courts have approved of the concept of anonymous juries. The idea behind an anonymous jury is that jurors need to be protected from potential violence. Does the concept of an anonymous jury comport with open justice and access to court proceedings? Is it perhaps a necessary evil in certain circumstances?

3. Read about the sensational coverage of the O.J. Simpson murder trial here (*The New York Times*). Suppose that the judge, concerned about the fair trial rights of Mr. Simpson, closed the trial to the press and the public. You are the judge considering an appeal of the trial court's closure order. What would be your specific considerations in thinking through whether to open the trial to the public?

Sixth Amendment Right to a Public Trial

Maryland - Scene in the Court-House at Annapolis - Trial of Mrs. Wharton on the charge of murdering General Ketchum by poison / from a sketch by Jas. E. Taylor. Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA

The First Amendment is not the only constitutional right at play when it comes to open criminal trials. The Sixth Amendment is very important as well.

The Sixth Amendment begins with the words, "In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial." The Sixth Amendment right to a public trial ensures that defendants are not tried in secret, such as the Spanish Inquisition, the dreaded English Star Chamber, or the French monarch Louis XV's practice of *lettre de cachet*—an order from the monarch that a person be imprisoned without a trial.

These practices are anathema to a free and open society. People facing criminal charges have the right to have their case heard in an open court of laws. Justice Hugo Black, in *In Re Oliver* (1948), forcefully wrote that "the guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."

In *Gannett v. DePasquale* (1979), the U.S. Supreme Court clarified that only the defendant, not the press or public, could assert a Sixth Amendment right to a public trial. The case involved a pretrial hearing of two men who had been charged with second-degree murder, robbery, and grand larceny. After the judge ordered the hearing closed from the press and public, a reporter covering the case challenged the closure order on First, Sixth, and Fourteenth Amendment grounds. The Court rejected the reporter's motion, writing:

"The Sixth Amendment's guarantee of a public trial is for the benefit of the defendant alone. The Constitution nowhere mentions any right of access to a criminal trial on the part of the public... While there is a strong societal interest in public trials, nevertheless members of the public do not have an enforceable right to a public trial that can be asserted independently of the parties in the litigation. The adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."

It was this oft-criticized decision in the *Gannett* case involving the Sixth Amendment that led to the historic *Richmond Newspaper* decision rooted in the First Amendment the next year. But, the cases reinforce (1) that the Sixth Amendment right to a public trial is asserted by the criminal defendant, not the press; and (2) it is the First Amendment that gives the press access to many criminal proceedings.

Similar to the First Amendment, the Sixth Amendment right to public access is not absolute. The court may need to close a courtroom to protect a witness or prohibit the disclosure of extremely sensitive information. But, generally, a judge can close a courtroom only when there is an overriding interest for closure and the closure lasts no longer than necessary. A judge must make particularized findings to support the closure, which again must be narrowly tailored to the specific situation.

Discussion Questions

1. Justice Hugo Black once wrote in *In Re Oliver* (1948): "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Do you agree with Justice Black? Why or why not?

2. An undercover sting operation has resulted in the arrest of a person who is allegedly one of the biggest cocaine traffickers in the city. On the first day of the trial, the city prosecutor asks the judge to close the proceedings indefinitely. She argues that the case will involve testimony from undercover officers whose identity would be revealed and also discussion of the sting operation, which could bring to light police procedures best kept secret for use in future police investigations. The defendant's lawyer objects to the closure, arguing that it violates his client's Sixth Amendment right to a public trial. If you are the judge, what would be your considerations in making a ruling?

Clashing Constitutional Rights: The First vs. the Sixth

Lawyers confer in the courtroom in Cambridge October 10 where British nanny Louise Woodward is being tried for the murder of nine month-old Matthew Eappen. Unlike in England, TV and still cameras are allowed in the courtroom to cover the trial.

Sometimes, the First Amendment right of public access to court proceedings and a criminal defendant's Sixth Amendment right to a public trial are quite complementary. Both the public and the defendant want a court proceeding that is exposed to the sunlight and not hidden in the darkness.

However, sometimes a criminal defendant wishes to close the courtroom to assert other rights protected by the Sixth Amendment, such as the right to an impartial jury. In such a case, the court has to balance the competing constitutional claims.

Consider the case of *Estes v. Texas* (1965), the corruption trial of Texas-based financier Billie Sol Estes. The conduct of members of the press at the preliminary hearing caused the U.S. Supreme Court to question the underlying fairness of the criminal proceedings. Justice Tom C. Clark acknowledged the importance of the First Amendment rights of the press, but indicated those must take a backseat to the right of due process and fundamental fairness to the defendant. He explained:

"The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."

In *Press Enterprise Co. v. Superior Court* (1986), the court agreed that suppression hearings in a criminal case normally should be open to the public and the press. However, a criminal defendant may assert that such openness could threaten the defendant's Sixth Amendment right to a fair trial. The Supreme Court explained:

"If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

Thus, a trial judge must make specific findings demonstrating that opening up the courtroom would have a "substantial probability" of negatively impacting a defendant's right to a fair trial, and second, that reasonable alternatives to closing the courtroom could not adequately protect the defendant's fair trial rights.

Note that a criminal defendant must do more than simply claim that opening up a courtroom proceeding would harm the defendant's right to a fair trial. The Court in *Press-Enterprise* explained that "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right." Instead, the court must articulate that it considered other alternatives, such as partial closure or court transfer. There may be a different location where far fewer people have knowledge of the alleged crime and its attendant circumstances.

Discussion Questions

1. Some of the more challenging constitutional law questions involve cases in which each side asserts a constitutional right in support of its position. Take a close look at the Sixth Amendment. What rights does it protect, and how do those collectively relate to the concept of the right to a fair trial?
2. The law imposes a responsibility on the part of trial court judges to make particularized findings and consider other alternatives prior to closing the courtroom. This allows appellate court judges to better review the trial court's judgment if the trial court's decision is appealed. How do these requirements of particularized findings and the consideration of alternatives lead to a greater likelihood of public access?

Access to Civil Court Proceedings

As noted, the U.S. Supreme Court has declared that the public and press have a First Amendment–based right of access to criminal trials and much of the criminal trial process. The U.S. Supreme Court has never formally declared a similar ruling with regard to civil court proceedings.

However, many state and lower federal courts have found a similar right of access—under both the First Amendment and the common law—to civil court proceedings. As the Ninth U.S. Circuit Court of Appeals declared in 2020 in *Courthouse News Service v. Planet*, "The Supreme Court has yet to explicitly rule on

whether the First Amendment right of access to information reaches civil judicial proceedings and records, but the federal courts of appeals widely agree that it does."

In the *Planet* decision, the Ninth Circuit reasoned that both experience and logic dictate that the press should have access to newly filed complaints in civil cases. The government had argued that while the press and the public should have access to such complaints at some point in time, they should not have them until judicial action is taken in the litigation. The Ninth Circuit scoffed at that argument, explaining that "[c]itizens could hardly evaluate and participate in robust public discussions about the performance of their court systems if complaints—and, by extension, the very existence of lawsuits—became available only after a judicial decision had been made."

For example, the South Dakota Supreme Court, in *Rapid City Journal v. Delaney* (2011), explained that the logic of opening criminal trials to the public is based on ensuring that a trial is fair and that the public appreciates that the criminal justice system is operating properly and fairly. The South Dakota Court reasoned that the same principles mandate the general opening of civil trial proceedings, writing: "Logically, the rationale for openness applies equally to civil trials. Open civil trials also protect the integrity of the system and assure the public of the fairness of the courts and our system of justice. We, therefore, hold that the First Amendment affords the media and public a qualified right of access to civil trials in this state."

These courts recognize that the right of access is not absolute. However, before issuing an order closing proceedings, judges must identify in their findings that closure was necessary to protect an overriding interest or important value and that the closure was narrowly tailored. Civil cases may be closed only in rare instances, such as cases involving trade secrets, privileged attorney client information, or contractual nondisclosure agreements.

Discussion Questions

1. Do you think the same rationales for finding a right of public access to criminal court proceedings should also apply to civil court proceedings? If so, why or why not?
2. What are some reasons litigants would want to keep their civil court proceeding private and closed? Presumably, sometimes the litigants have sensitive information that they do not want disclosed. But should the litigants' individual interests trump societal interests in ensuring that our courts are working and operating properly?

Secret Justice and the Sealing of Court Records

The Hartford Courant building in downtown Hartford, seen from I-84 East. 30 June 2009. Sage Ross / Wikimedia Commons.

"Democracies die behind closed doors."
—Judge Damon Keith in *Detroit Free Press v. Ashcroft* (6th Cir. 2002)

At times, courts have engaged in a process pejoratively known as "secret justice." Law professor David S. Ardia writes powerfully in his 2017 Cardozo Law Review titled "Court Transparency and the First Amendment": "Judges across the country routinely close court proceedings and restrict public access to judicial records, including sealing entire cases. In recent years, it has come to light that some courts have maintained secret dockets containing thousands of cases."

An illuminating example occurred in the Connecticut state court system where for decades the courts had denied the public access to court files, and occasionally prevented court personnel from "acknowledging the existence of these cases altogether." Some of the cases involving sealing court records in cases of juvenile offenders or bar grievances—areas where privacy concerns are heightened—but other cases simply involved prominent persons or celebrities who did not want details of their divorce cases revealed to the larger public.

Two newspapers, *The Hartford Courant and the Connecticut Law Tribune*, challenged the court administrative system that allowed for this system of secret justice in *Hartford Courant Co. v. Pellegrino* (2004). The Second U.S. Circuit Court of Appeals determined that just as the public and press have a qualified right of access to criminal court proceedings, the public and the press also have a qualified right of access to certain court records. This right to access court records included "a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings."

This is not the only time a court system had a dual docket system—one for publicly available cases and one for cases closed to the public. The Eleventh U.S. Circuit Court of Appeals criticized the United States District Court for the Middle District of Florida from maintaining such a dual docket system that allowed cases to be tried in secret. In *United States v. Valenti* (1993), the appeals court wrote that "the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings."

Closing cases and sealing records occurred with greater frequency in the aftermath of September 11, 2001, and the subsequent "War on Terror." Shortly after the 9/11 attack, Chief Immigration Judge Michael Creppy issued a memorandum implementing greater security measures around deportation hearings. The memo required immigration judges to close "special interest" deportation hearings that dealt with aliens connected to terrorist activities, or aliens that might possess information related to terrorist activities. The memo said that "the courtroom must be closed for these cases—no visitors, no family, and no press." The restrictions include "confirming or denying whether such a case is on the docket or scheduled for such a hearing."

However, the Sixth U.S. Circuit Court of Appeals issued a searing rebuke of the practice of closing deportation hearings, which traditionally were held in the open. Judge Damon Keith wrote in *Detroit Free Press v. Ashcroft* (2002) that deportation hearings—though technically a creature of civil law—were similar to criminal proceedings and thus presumptively open under the rationale of the Supreme Court's decision in *Richmond Newspapers.* He wrote in memorable language: "The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."

Secret justice remains a constant threat for those committed to open access to the courts. Wealthy individuals, including celebrities, often seek to have courts seal their court records alleging privacy concerns. Open government advocates

often have to press forward with litigation to try to open up closed records in certain cases. For example, several press entities have sought to intervene and have a bankruptcy court in New York City open up the records in Purdue Pharma's Chapter 11 bankruptcy case. The pharmaceutical company was a producer of OxyContin, and has been the target of numerous criminal and civil cases for its part in contributing to hundreds of thousands of overdose deaths.

Discussion Questions

1. The government sometimes will assert national security–based arguments in favor of closing certain cases and records from public view. It frequently did so in the post 9/11, "War on Terror" era. The government also did so in the deportation cases discussed above. How should we balance the government's assertion of a security interest against the public's right to know and assess how its judicial system is operating? What should a judge require the government to prove in order to establish such a security interest? How can a judge assess the good faith of a government request since the government may well have a tendency to request closure to avoid even remote risk to security?

2. Privacy advocates assert that parties to certain proceedings, such as divorce cases, often have private, personal information that needs to be kept out of public view. They also assert that such information could have a negative impact on the children involved. Do these reasons seem valid enough to trump the presumptive right to having open justice in this country? Why is it important for the public to see how justice works in the family courts? How would courts decide what information is so sensitive to personal or family privacy that it should be kept out of public view?

Cameras in the Courts

Television cameras are seen in front of the Supreme Court in Washington June 19, 2014. The U.S. Supreme Court on Thursday ruled that implementing an abstract idea using a computer does not make an invention patent eligible. REUTERS/Joshua Roberts

"I think the case is so strong that I can tell you that the day you see a camera come into our courtroom it's going to roll over my dead body."
— U.S. Supreme Court Justice David Souter in 1996 to a Senate subcommittee

The United States Supreme Court, the highest court in the land, or the Court of Last Resort, still doesn't allow cameras in its courtroom. The Court provides audio and written transcripts of oral arguments, but no camera footage.

In 2019, Senator Richard Durbin (D-IL) introduced the Cameras in the Courtroom Act, Senate Bill 822, that would require the Supreme Court to allow camera coverage of all U.S. Supreme Court cases unless the Court "decides by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved." But this bill—like many before it in previous sessions of Congress—didn't pass.

Beyond the U.S. Supreme Court, cameras are allowed in some courts but not others. Many state courts allow camera coverage at least at some level of their court systems. However, the federal courts have been slower to accept cameras, though they have experimented with pilot programs involving limited coverage.

Widespread opposition to cameras began with the circus-like atmosphere at the criminal trial of Bruno Hauptmann, the kidnapper of famed aviator Charles Lindbergh's baby son. Nearly 700 members of the media, including 120 camera

operators, attended the trial. Chaos reigned at the trial, with photographers climbing on top of counsels' tables to take photos. This carnival-like atmosphere caused the American Bar Association to oppose broadcast coverage of trials.

Unruly behavior by the press led to similar atmospheres at the criminal trials of financier Billy Sol Estes, and Dr. Samuel Sheppard, the real-life person behind the TV show and movie *The Fugitive*. Ultimately, the U.S. Supreme Court ruled in *Estes v. Texas* (1965) and *Sheppard v. Maxwell* (1966) that the defendants were entitled to new trials in part because of the disruptive conduct of some of the press covering these high-profile trials.

However, Florida began experimenting with camera coverage in the 1970s. That ultimately led to another U.S. Supreme Court decision involving broadcast coverage, *Chandler v. Florida* (1981), where the Court ruled that the state of Florida did not violate the fair-trial rights of two defendants because their trial proceedings were televised. The case involved two former Miami Beach police officers who were facing criminal charges of conspiracy, grand larceny, and other charges. The defendants were convicted in a televised trial. On appeal, the defendants contended that the presence of cameras in their trial was an automatic denial of due process. The Court rejected that argument, writing:

"An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger, that in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage."

Chandler v. Florida stands for the principle that cameras do not per se violate the fair-trial rights of defendants under the Sixth Amendment.

Courtroom cameras give the public crucial insight into government function rarely seen by the public. Compare the judicial branch to the other branches of government. Presidents give televised press conferences, state of the union addresses, and other public speeches. Congress holds much of its business in

full public view, particularly with the advent of C-SPAN. But the public at large gets to see far less of the judicial branch, particularly the federal courts. Many high-profile trials are not televised, so the public must rely on the reporting of journalists inside the courtroom.

Proponents of cameras in the courts emphasize that they provide the public with much-needed knowledge about the functioning of the justice system, educate students from grade school to law school about litigation, and advance the free flow of information—a venerated First Amendment value. After all, the First Amendment generally prohibits government officials from operating in shrouds of secrecy and keeping its citizens in the dark. Cameras further First Amendment values by allowing the public to receive information about the judicial system.

Opponents counter that cameras can be too disruptive and cause attorneys and other trial participants to showboat and play to the camera. Former law school dean Gerald F. Uelmen, who also served on O.J. Simpson's criminal defense team in 1994, once explained: "For a 'trial of the century,' adding television cameras in the courtroom is like throwing gasoline on a fire. It transforms the proceedings into a sort of 'hype heaven,' where exaggeration knows no limits."

Discussion Questions

1. Court TV, which prides itself on gavel-to-gavel coverage of court proceedings, has covered numerous high-profile criminal cases through the years, from the Menendez brothers (who were convicted of killing their parents) to the murder trial of former football star O.J. Simpson to—much more recently—the sexual assault trial of Hollywood mogul Harvey Weinstein. Do you believe that court proceedings should be televised? Critics charge that the cameras cause attorneys to showboat and have the potential to disrupt the normal court processes. Can you see any negatives to televising court proceedings?

2. The U.S. Supreme Court is the highest court in the land and yet its oral arguments are not televised. The Court does provide written transcripts of its oral argument proceedings. However, given the importance of the Court and its work, doesn't the public deserve an opportunity to directly observe the Court's proceedings?

Court Cases

- *Chandler v. Florida,* 449 U.S. 560 (1981). The U.S. Supreme Court ruled that the Constitution does not prevent states from allowing broadcast coverage of criminal trials. The Court held that two police officers facing criminal charges did not have their Sixth Amendment rights violated when they were convicted after televised trial proceedings.

- *Estes v. Texas*, 381 U.S. 532 (1965). The U.S. Supreme Court reversed the conviction of financier Billy Sol Estes because of the adverse pretrial publicity and commotion generated by the conduct of the press at Mr. Estes' preliminary hearing. The Court determined that this conduct threatened Mr. Estes' due process rights to a fair proceeding.

- *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). The U.S. Supreme Court invalidated a Massachusetts law requiring the closure of criminal trials involving sexual offenses against minors. The Court adopted Justice William Brennan's two-part test developed in his concurring opinion in Richmond Newspapers, Inc. v. Virginia (1980).

- *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The U.S. Supreme Court ruled that criminal trials are presumptively open. The Court explained that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."

- *Presley v. Georgia*, 558 U.S. 209 (2010). The Supreme Court reversed a defendant's conviction, because the trial judge did not open up the voir dire (jury selection) process. The Court said this violated the defendant's Sixth Amendment right to a public trial.

- *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986)("Press-Enterprise II). The U.S. Supreme Court ruled that the public and press had a presumptive right of access to attend pretrial criminal proceedings, specifically a preliminary hearing.

Resources

Further Reading

Janna Adelstein, "Courts Continue to Adapt to Covid-19," Brennan Center for Justice, Sept. 10, 2020.

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Deborah Fisher, "Family members, others shut out of court proceedings in Davidson County," Tennessee Coalition for Open Government, Oct. 16, 2020.

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Edmund H. Mahony, "Hartford Courant files federal First Amendment lawsuit over Connecticut juvenile law that makes court cases secret," Hartford Courant, Dec. 11, 2019.

Angela Morris, "Judges Rush to Learn Video Conferencing as Shelter-In-Place Orders Spread Across Texas Metros," Texas Lawyer, March 24, 2020.

Reporters Committee for Freedom of the Press, Secret Justice: Secret Dockets, 2003.

Reporters Committee for Freedom of the Press, "News organizations urge federal court to unseal judicial records in Purdue Pharma bankruptcy case," Nov. 23, 2020.

Gabe Roth, "Why Doesn't the Supreme Court Have Cameras?" MSNBC.com, July 24, 2015.

Stephen E. Smith, The Right to a Public Trial in the Time of COVID-19, 77 Washington and Lee Review Online, (2020).

Glossary

Justice William Brennan articulated the **experience and logic** test in his concurring opinion in *Richmond Newspapers Inc. v. Virginia* (1980) to determine whether certain court proceedings are open to the public and press. The test asks whether there is a history and tradition of openness of the proceeding and whether opening such a proceeding would further its underlying purpose.

The First Amendment to the U.S. Constitution enumerates five freedoms: religion, speech, press, assembly, and petition. Ratified by the states as part of the Bill of Rights in 1791, it serves as our blueprint for personal liberty, freedom of thought, and freedom of conscience. Its free-speech and free-press clauses form the basis for the public and press right of access to court proceedings.

The Sixth Amendment to the U.S. Constitution contains a host of constitutional protections, including the rights to a speedy trial, an open trial, an impartial jury, information about accusations and charges, to confront witnesses, to compel witnesses to come to court on the defendant's behalf, and the right to assistance of counsel. Collectively, these Sixth Amendment rights are colloquially known as protecting criminal defendants' rights to a fair trial.

A **qualified right of access** means that there is a presumption, or at least a good chance of, access to a court proceeding or record. However, the right is qualified instead of absolute. This means that a judge could decide to close the proceeding or seal the record if there is a compelling reason to do so that is done in a narrowly tailored method.

Voir dire is the term for the process of selecting a jury. Attorneys on each side ask a series of questions to try to determine which prospective members of the jury are too biased to sit on the case, and which prospective jurors they find acceptable.

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; 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. ~ The First Amendment to the U.S. Constitution (1791)

First Amendment Watch

Arthur L. Carter Journalism Institute

New York University

20 Cooper Square, NY, NY 10003

FirstAmendmentWatch.org

First Amendment Watch

Stephen D. Solomon, J.D., Founding Editor and Marjorie Deane Professor of Journalism, NYU

Mary Ellen Egan, Managing Editor

Soraya Ferdman, Staff Writer

Contact us at firstamendment@nyu.edu

This teacher guide was written by David L. Hudson, Jr.