

NOTES

A Constitutional Right of Access to Pretrial Documents: A Missed Opportunity in *Reporters Committee for Freedom of the Press*

INTRODUCTION

In *Richmond Newspapers, Inc. v. Virginia*,¹ the Supreme Court held that a right of public access to criminal trials is implicit within the first amendment.² According to that decision, courts can preclude the public from attending a criminal trial only when there are strong interests in favor of secrecy. The Supreme Court has only applied this right to criminal proceedings, but other federal courts have noted that the Court's reasoning in *Richmond Newspapers* would apply as well to civil trials.³

Subsequent to the *Richmond Newspapers* decision, several lower federal courts have had to decide whether the existence of a right of public access to judicial proceedings also leads to finding the existence of a right of public access to documents used in those proceedings. These cases have all been brought by members of the press who attempted to gather information within the documents to disseminate to the public.⁴ Lower courts which have faced the issue have made their decisions using different and sometimes conflicting reasoning.

This Note will demonstrate that public policy concerns give great weight to finding the existence of a constitutional right of access to documents used in all judicial proceedings. In particular, it will spotlight a recent case, *In*

1. 448 U.S. 555 (1980).

2. The first amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I, § 1.

3. See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1178 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.—C.L. L. REV. 415, 430 (1981) anticipated this expansion of the *Richmond Newspapers* doctrine.

4. The press has been vigorous in engaging in these suits. See, e.g., *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Publicker*, 733 F.2d 1059; *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983). Their status as professional news gatherers has no significance in these cases, however. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978).

re Reporters Committee for Freedom of the Press,⁵ where the Court of Appeals for the District of Columbia ruled against finding a constitutional right of access to pretrial documents, and show why that case should have been decided differently. Part I examines the *Richmond Newspapers* decision. Part II shows that while the Supreme Court has not yet applied the right of access to civil proceedings, other federal courts have reasonably found that there is a right of access to civil proceedings. Part III looks at arguments courts have made for and against applying the right of access to civil pretrial documents and concludes that, because of the significant benefits, a right of access should be applied to these documents. Finally, Part IV proposes that a sliding scale balancing test be implemented to determine when the right of access can be overridden.

I. SUPREME COURT DEVELOPS RIGHT OF ACCESS

A. Constitutional Basis

In a series of cases beginning with *Richmond Newspapers, Inc. v. Virginia*,⁶ the Supreme Court established and developed a right of public access to judicial proceedings. At least six justices believed that this right derives from the first amendment.⁷

In *Richmond Newspapers* a state trial court granted a criminal defendant's motion to close his trial to the public. Although the prosecutor did not object, *Richmond Newspapers, Inc.* and two individual newspaper reporters intervened and objected to the closure order. The interveners claimed the first amendment guaranteed the public a right of access to the trial. The state courts ruled against the interveners so they appealed to the United States Supreme Court.⁸ The result was seven separate opinions—six finding a constitutional right of access.⁹

The plurality opinion, written by Chief Justice Burger, stated that the right of access to judicial proceedings is implicit in the first amendment

5. 773 F.2d 1325.

6. 448 U.S. 555 (1980).

7. See *infra* note 9. In separate concurring opinions Justices White and Blackmun asserted that the sixth, not the first, amendment guarantees a right of access to criminal trials. *Richmond Newspapers*, 448 U.S. at 581, 601.

8. *Id.* at 559-63.

9. Chief Justice Burger's plurality opinion was joined by Justices White and Stevens, who also wrote their own separate concurring opinions. Justice Brennan's opinion concurring with the result was joined by Justice Marshall. Justices Stewart and Blackmun each filed separate opinions concurring in the judgment. Justice Rehnquist dissented. Justice Powell did not participate in the disposition of *Richmond Newspapers*, but in a concurring opinion in *Gannett v. DePasquale*, 443 U.S. 368, 397 (1979), a case with similar facts, he argued for a first amendment right of access to criminal proceedings. Fenner & Koley, *supra* note 3, at 420-21, notes that this lack of unity has made this an uncertain area of the law.

because it gives "meaning" to the express rights of that amendment.¹⁰ According to the Chief Justice, freedom of speech, freedom of the press, the right to peaceful assembly and the right to petition the government "share a common core purpose of assuring freedom of communication on matters relating to the functioning of the government."¹¹ A right of public access to trials furthers all those express rights because "[p]lainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."¹²

Justice Brennan, in the only other opinion joined by another justice,¹³ used a different analytical framework to establish the right of access to judicial proceedings. He noted that the first amendment is usually invoked "to protect communication between speaker and listener," the so-called free speech clause.¹⁴ Justice Brennan believed, however, that the first amendment encompasses more than the right of free speech—it also "has a *structural* role to play in securing and fostering our republican system of self-government."¹⁵ This structural analysis granted first amendment protection to the "process of communication necessary for a democracy to survive."¹⁶ Thus, according to Brennan, not only was free speech protected, but the first amendment also conferred a "right to gather information" which will contribute to our "republican system of self-government."¹⁷ Public access to trials "assumes structural importance" because such access enabled citizens to gather "meaningful" information.¹⁸

B. Scope of the Right of Access

In *Richmond Newspapers*, Justices Burger and Brennan each declared the existence of a right of access to criminal trials. Although each had a different analytical basis for finding the right, both used the same two elements to define its scope: common law tradition and public policy.

10. *Richmond Newspapers*, 448 U.S. at 575. See *supra* note 2.

11. *Id.*

12. *Id.*

13. See *supra* note 9.

14. *Richmond Newspapers*, 448 U.S. at 586-87.

15. *Id.* at 587 (emphasis in original).

16. *Id.* at 588.

17. *Id.* at 586-87.

18. *Id.* at 597-98. Fenner & Koley, *supra* note 3, at 426-27, sum up the justices' respective positions:

The Chief Justice's theory, in a sentence, is that the first amendment carries with it those protections needed to make the amendment effective. Justice Brennan's theory, similarly reduced, is that the specific provisions of the first amendment and the constitutional structure of our government imply certain protections derived from the former and necessary for the preservation of the latter.

1. Tradition

Chief Justice Burger detailed the centuries-old tradition of public access to criminal trials.¹⁹ The Chief Justice's research revealed that England has had open trials since at least the thirteenth century.²⁰ He stated that this tradition became "an attribute of the judicial systems of colonial America."²¹

Justice Brennan used tradition to limit the "right to gather information" he had enunciated in setting out his structural analysis.²² Brennan foresaw that persons could attempt to misuse his structural test by claiming *all* information contributes to their self-governance, no matter how tenuous their claims.²³ A tradition of a right of public access can be used as an element to curtail overzealous application of the right because such a tradition "implies the favorable judgment of experience."²⁴

2. Public Policy

In their opinions in *Richmond Newspapers*, Justices Burger and Brennan were enthusiastic about the public policy benefits of open criminal trials. Each justice listed several specific benefits which derive from open proceedings; these benefits can generally be classified as monitoring, educational and therapeutic.

Both justices believed that open trials help monitor our system of justice because openness discourages "misconduct of [the] participants."²⁵ The parties would be less likely to commit perjury²⁶ and the judge would be less likely to make a biased decision²⁷ if the public were allowed to attend the proceeding. Brennan stated that the right of access to trials acts as a check upon the judiciary, "akin to the other checks and balances" present in our system of government.²⁸

Burger stated that open trials serve to educate the public about both particular cases and our system of justice in general.²⁹ The educational function is the underpinning of Brennan's structural analysis, which he used

19. *Richmond Newspapers*, 448 U.S. at 564-69.

20. *Id.* at 565.

21. *Id.* at 567.

22. *See supra* note 17 and accompanying text.

23. *Richmond Newspapers*, 448 U.S. at 588.

24. *Id.* at 589.

25. *Id.* at 569.

26. *Id.* at 597.

27. *Id.* at 569.

28. *Id.* at 596.

29. *Id.* at 572. This appears related to Justice Brennan's structural analysis but really is not. Justice Burger felt that when the public is aware of how the judicial system operates it will be more accepting of its decisions. Justice Brennan, on the other hand, wanted members of the public to be well educated about government so they can better govern themselves.

to derive the right of access.³⁰ Brennan stated, "judges are not mere umpires, but, in their own sphere, lawmakers. . . . [C]ourt rulings impose official and practical consequences upon members of society at large."³¹ Since a trial is a "governmental proceeding," the happenings at a trial are of great public interest and should be made public.³²

Finally, the therapeutic value of public trials impressed Chief Justice Burger. He believed that when the community can observe justice carried out, in its entire process, their natural desire for "satisfaction" of wrongs will not be vented in an illegal manner.³³

II. EXTENSION OF *Richmond Newspapers* RIGHT

A. Press-Enterprise

In *Press-Enterprise Co. v. Superior Court of California*,³⁴ the Supreme Court applied the right of access first enunciated in *Richmond Newspapers*³⁵ to the voir dire of a criminal trial.³⁶ Chief Justice Burger wrote the majority opinion³⁷ and applied the same tradition and public policy analysis he used in the earlier case.³⁸ First, the Chief Justice noted that jury selection, like the trial itself, has traditionally been open.³⁹ Second, he reiterated the same public policy benefits of open proceedings he had stated in *Richmond Newspapers*.⁴⁰ According to Burger, these benefits also accrue at the voir dire phase of a trial.⁴¹ The Court held that while at times there may be special

30. See *supra* notes 15-18 and accompanying text.

31. *Richmond Newspapers*, 448 U.S. at 595.

32. *Id.* at 596.

33. *Id.* at 571. Thus vigilantism and other retributive instincts will be pacified. *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983) called this a "catharsis."

34. 464 U.S. 501 (1984).

35. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

36. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court had already extended the *Richmond Newspapers* doctrine once by holding that the public could not be excluded from learning the testimony at a trial.

37. The Chief Justice captured the approval of the Court with this opinion: Justice Brennan did not write a separate opinion and the three justices who did merely emphasized particular points.

38. *Press-Enterprise*, 464 U.S. at 507-09.

39. *Id.* at 506-08. For example, the jury selection at the murder trial of the British soldiers who participated in the Boston Massacre was open.

40. The Chief Justice used the monitoring, educational and therapeutic benefits. *Id.* at 508-09. See *supra* notes 25-33 and accompanying text.

41. *Id.*

reasons to keep personal answers of the veniremen out of the public domain, that concern would not justify automatic closure of the voir dire.⁴²

The Court's failure to distinguish voir dire, a pretrial proceeding, from the trial itself is significant. This decision showed that the right of access announced in *Richmond Newspapers* is not limited to trials.

B. Civil Proceedings

Although *Richmond Newspapers* and *Press-Enterprise* concerned criminal proceedings, the Supreme Court gave broad hints it would apply the right of access enunciated in those cases to civil trials as well. In a footnote to his *Richmond Newspapers* opinion, Chief Justice Burger stated that while a claim of a right of access to civil trials was not before the Court, "we note that historically both civil and criminal trials have been presumptively open."⁴³ In his concurring opinion, Justice Brennan expressly applied the right of access equally to criminal and civil trials.⁴⁴

Several lower federal courts have had to decide the appropriateness of applying the right of access to civil proceedings. The majority of courts which have faced the issue have found a constitutional right of access to civil proceedings in both the trial and the pretrial stages.⁴⁵ Courts which have decided in favor of the right of access show that the policy reasons for keeping criminal proceedings open also apply to civil proceedings;⁴⁶ the

42. *Id.* at 511. Public voir dire may succumb before a "compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." *Id.* Since this case was about the rape of a teenage girl, Burger said that some questions about rape may have been embarrassing to potential jurors who had themselves been raped.

Justice Marshall, in a concurring opinion, wanted to limit the ability of potential jurors to request privacy during voir dire even when they were being asked very personal questions. Marshall felt there was *more* reason for voir dire to be public when personal matters were discussed because the *Richmond Newspapers* policies are "most severely jeopardized when courts conceal from the public sensitive information that bears upon the ability of jurors impartially to weigh the evidence presented to them." *Id.* at 520.

43. *Richmond Newspapers*, 448 U.S. at 580 n.17.

44. *Id.* at 596. In his concurring opinion, Justice Stewart also explicitly applied the right of access to civil trials: "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599.

45. *See, e.g.*, *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied* 465 U.S. 1100 (1984). *See also In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984), where the eighth circuit found a right of access to contempt proceedings, which it characterized as "a hybrid containing both civil and criminal characteristics." *Id.* at 661. *But see In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985).

46. *See Publicker*, 733 F.2d at 1070 (a "survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access to criminal trials"); *Continental Illinois*, 732 F.2d at 1308 ("the policy reasons for granting public access to criminal proceedings apply to civil cases as well"); *Brown & Williamson*, 710 F.2d at 1179.

monitoring, educational and therapeutic benefits stated in *Richmond Newspapers* still accrue.⁴⁷

One court of appeals case has declined to apply the right of access to civil trials. The majority opinion in *In re Reporters Committee for Freedom of the Press*,⁴⁸ written by Judge Scalia, stated that it was "unlikely" that the benefits of open proceedings "are as important in the context of civil suits between private parties as they are in criminal prosecutions."⁴⁹ Unfortunately, the opinion failed to support this assertion.

There are two possible rationales for Judge Scalia's claim that access to civil proceedings is not as important as access to criminal proceedings. First, since the penalty for conviction of a crime involves a man's liberty, and potentially every man's liberty, perhaps Judge Scalia believed the proper conduct of criminal proceedings was more "important" than civil ones. Second, since civil litigation almost always involves private parties, perhaps Judge Scalia believed that the public would not benefit by having access to private disputes. Both of these possible reasons are flawed. At times, civil litigation is extremely important to the public: "[c]ivil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy."⁵⁰ Millions of people may be affected by precedents made at a civil trial.

Even if the consequences of a particular civil trial are not of the same magnitude as the consequences of a criminal trial, the benefits of access to the civil trial outweigh any known reasons for a rule automatically excluding the public. One district court case, *Zenith Radio Corp. v. Matsushita Electric*

47. See *supra* notes 25-33 and accompanying text.

In 1983 the Federal Rules of Civil Procedure were amended to give federal judges even more power in civil cases, thus increasing the need to monitor their actions. Rule 16, concerning pretrial management, was redrafted with the idea that today's civil litigation calls for more involvement by the trial judge. FED. R. CIV. P. 16 advisory committee's notes; A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 21 (1984) (Miller was the Reporter for the drafting committee of the 1983 amendments). Sections (a) and (c) of that rule direct trial judges to concern themselves with such things as expedition of the action and facilitating settlement. MILLER, *supra*, at 26, states that this is the first time the word "settlement" has been in the federal rules: "It simply recognizes the fact that settlement is now a fundamental, basic, almost universal aspect of being a judge." *Id.* Rule 26 was also rewritten to give judges more power to prevent discovery abuses. See *infra* note 132.

48. 773 F.2d 1325. See also *infra* notes 69-74 and accompanying text.

49. *Id.* at 1337.

50. *Brown & Williamson*, 710 F.2d at 1179. See also Justice Brennan's concurring opinion from *Richmond Newspapers*, 448 U.S. at 596, where the Justice stated, "mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant."

See also *Iowa Freedom of Information Council*, 724 F.2d at 661:

Arguably, the public interest in securing the integrity of the fact-finding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former but not the latter, it is nonetheless true that the public has a great interest in the fairness of civil proceedings.

*Industrial Co.*⁵¹ went so far as to suggest that the right of access to judicial proceedings should be even stronger in civil cases than criminal cases because the concern that publicity will jeopardize a defendant's sixth amendment right to a fair trial is rarely present in civil cases.⁵²

III. PRETRIAL DOCUMENTS

A right of access to the documents used in judicial proceedings would be a logical corollary to the first amendment right of access to the proceedings themselves.⁵³ Some federal courts have so decided, in both civil and criminal cases.

A. Criminal

In *Associated Press v. United States District Court*,⁵⁴ the Court of Appeals for the Ninth Circuit held that the public had a first amendment right to examine the pretrial documents from a criminal trial.⁵⁵ That case was brought by members of the press who were denied access to documents relating to suppression hearings in the DeLorean criminal trial.⁵⁶ The court of appeals applied the elements of the right of access set out in *Richmond Newspapers*.⁵⁷ First, the court stated that there was a tradition of access: "[t]here can be little dispute that the press and public have historically had a common law right of access to most pretrial documents."⁵⁸ Second, the court found public policy benefits existed when there was a right to access: pretrial documents "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning."⁵⁹ Thus, the court concluded, "[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them."⁶⁰

51. 529 F. Supp. 866 (E.D. Pa. 1981).

52. *Id.* at 897 n.55.

53. See generally Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984); Comment, *Access to Trial Exhibits in Civil Suits*: In re Reporters Committee for Freedom of the Press, 60 ST. JOHN'S L. REV. 358 (1986).

54. 705 F.2d 1143 (9th Cir. 1983).

55. *Id.* at 1145.

56. *Id.* In an earlier case, *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982), this circuit first found that the right of access applied to a criminal suppression hearing. But see *Gannett Co. v. DePasquale*, 443 U.S. 368, 378-81 (1979), where, before *Richmond Newspapers* was decided, the Supreme Court held there was no sixth amendment right of access to a suppression hearing because the evidence, if it is suppressed, should not be disseminated.

57. 448 U.S. 555 (1980).

58. *Associated Press*, 705 F.2d at 1145.

59. *Id.*, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

60. *Id.* at 1145.

B. Civil

Although the Supreme Court, in *Richmond Newspapers* and its progeny,⁶¹ did not expressly acknowledge a right of access to pretrial documents in civil proceedings, finding such a right is consistent with the reasoning of the Court's decisions. At least two circuits, the sixth⁶² and the seventh,⁶³ have recognized a constitutional right of access to pretrial documents, while the Court of Appeals for the District of Columbia doubts that the right exists.⁶⁴

In *Brown & Williamson Tobacco Corp. v. F.T.C.*,⁶⁵ a tobacco company went to court to challenge the Federal Trade Commission's proposed changes in its methodology for testing the level of pollutants within cigarettes. Upon requests by both parties, the district court placed all documents filed by the agency under seal, preventing public access.⁶⁶ A public interest organization, the Public Citizen Health Research Group, appealed this action. The Court of Appeals for the Sixth Circuit, relying upon the first amendment and the common law, held that the trial court's seal was improper. The decision stated that the trial court must justify nondisclosure before it can seal documents.⁶⁷

*In re Continental Illinois Securities Litigation*⁶⁸ arose when shareholders of a bank, which was facing severe financial losses, brought a derivative action to compel the bank to assert any claims it may have had against third parties. The bank's directors formed a Special Litigation Committee to evaluate the derivative claims. The Committee drafted a report which recommended that the claims against most of the potential defendants be dropped. The trial judge, in deciding the disposition of the derivative suits, agreed with the Committee's report only with respect to some of the potential defendants.⁶⁹

Reporters for *The Wall Street Journal* and the *Chicago Sun-Times*, who had been covering the bank's situation, requested a copy of the Committee's report. The trial judge ordered that any materials he had considered should be made public, including the Committee's report.⁷⁰ The bank appealed this

61. See *supra* notes 34-42 and accompanying text.

62. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983).

63. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).

64. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1342 (D.C. Cir. 1985). See also *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984), which was related to the underlying controversy in *Reporters Committee*. In *Tavoulaareas* Judge Tamm said that the *Washington Post* had no first amendment right of access to the documents not used at trial. This judgment and opinion were subsequently vacated by a rehearing *en banc*, 737 F.2d 1170.

65. 710 F.2d 1165.

66. *Id.* at 1176.

67. *Id.*

68. 732 F.2d 1302.

69. *Id.* at 1304-06.

70. *Id.* at 1306-07.

decision but the Court of Appeals for the Seventh Circuit held that there is a presumption in favor of public access to judicial records and the bank had failed to rebut it.⁷¹

The conflict underlying *Reporters Committee* began when William Tavoulaareas, the president of Mobil Oil Corp., brought a libel action against *The Washington Post* and several of its employees. In the course of the lawsuit, the *Post* discovered a large number of documents from Mobil, which was a third party to the lawsuit. Mobil requested a protective order to prevent public dissemination of the information it had provided, stating that the information contained trade secrets. The district court granted Mobil's motion based solely upon an affidavit of one of the corporation's vice-presidents who claimed, in general terms, that release of the documents could injure Mobil's shipping business and its relations with Saudi Arabia.⁷²

Although the *Post* did not object to the court's decision, four reporters and The Reporters Committee for Freedom of the Press⁷³ filed a motion to intervene in order to ask the court to rescind the protective order. The district court declined to reconsider the protective orders; it did state, however, that thirty days after completion of the trial it would hold a hearing and require Mobil to explain why the materials were confidential.⁷⁴

At the post-trial hearing Mobil waived most of its confidentiality claims and the district court disallowed the remaining ones. Even though they then had access to all the materials, the Reporters Committee still appealed the initial decision not to lift the protective orders.⁷⁵ The District of Columbia Court of Appeals, in an opinion written by Judge Scalia, held that there was no first amendment right of access to materials not used in the trial, even ones which the judge relied upon in considering a motion for summary judgment. He further stated that sealing the trial exhibits until the completion of the trial did not violate a common law right of public access.⁷⁶ In his dissent, Judge Wright agreed that there was no right of access to the materials used before the trial, but he argued that there is a right of contemporaneous access to the trial exhibits.⁷⁷

Although the facts of *Reporters Committee* are different than those of *Brown & Williamson* and *Continental Illinois*, the underlying issue is the

71. *Id.* at 1304.

72. *Reporters Committee*, 773 F.2d at 1326-28.

73. This is an association of news reporters devoted to the protection of first amendment rights.

74. The trial judge felt it would be too disruptive to stop the trial to decide the intervener's claims. *Reporters Committee*, 773 F.2d at 1327.

75. The Court of Appeals for the District of Columbia agreed that the issue was not moot since the question of prejudgment release was capable of repetition and would evade review if they did not rule upon it. *Id.* at 1328-30. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976).

76. *Reporters Committee*, 773 F.2d at 1336.

77. *Id.* at 1341.

same. Thus, factual differences alone do not explain the different results. In light of the evidence of a tradition of public access to pretrial documents and the strong public policy arguments in favor of such a right, federal courts should decline to follow *Reporters Committee's* lead and instead acknowledge the existence of the right.

1. Tradition

All courts which have dealt with the issue, even those which deny the existence of a constitutional right of access to pretrial documents, recognize that there is a common law tradition of public access to some pretrial documents.⁷⁸ To support this common law tradition, most courts have relied upon a statement by the Supreme Court in *Nixon v. Warner Communications, Inc.*:⁷⁹ “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents.”⁸⁰

In deciding against a right of access to pretrial documents, however, the majority in *Reporters Committee* did not accept this generalization by the Supreme Court. In his opinion Judge Scalia made a distinction according to *when* the right of access attaches. Scalia stated that not only is there no tradition of access to documents before the trial is completed, in reality the opposite tradition exists; Scalia believed there is a “prejudgment *nonaccess* rule.”⁸¹

The support cited by Scalia for his “nonaccess rule” shows that his proposition is tenuous at best. The judge relied upon nineteenth century

78. See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984) (“The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute.”); *Continental Illinois*, 732 F.2d at 1308; *Associated Press*, 705 F.2d at 1145; *Zemith Radio Corp. v. Matsushita Electric Indus. Corp.*, 529 F. Supp. 866 (E.D. Pa. 1981); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984).

Even Judge Scalia, in *Reporters Committee*, 773 F.2d at 1333, stated, “we take it as a given that there is a tradition of public access to court records.” Judge Scalia quarreled with the other courts about when this right attaches, however. See *infra* note 81 and accompanying text.

For commentary doubting a common law right, see Marcus, *Myth and Reality in Protective Order Litigation*, 61 CORNELL L. REV. 1 (1983).

79. 435 U.S. 589 (1978).

80. *Id.* at 598. This language is cited by *Associated Press*, 705 F.2d at 1145, for example.

In *Nixon*, Warner Communications sought access to the tape recordings which were used in the criminal trial of several of the ex-President's aides. The press had already received transcripts of the tapes and heard them played but they also wanted physical access so they could copy them. The Supreme Court held that the freedom of the press clause in the first amendment did not compel allowing the press physical access to the tapes. *Id.* at 610. Several factors make *Nixon* non-controlling as to the determination of a right of access to pretrial documents. First, that action was brought under the freedom of the press clause, not a claim of a right of access. Second, in that case the interveners wanted to handle the actual evidence during the trial, which would interfere with the proceedings. In right of access cases the public only wants disclosure of what is in the documents. Third, that case involved elements of executive privilege.

81. *Reporters Committee*, 773 F.2d at 1335-36.

cases⁸² which hold that a trial court can prohibit its records from being used for improper purposes, such as the publication of "the painful and sometimes disgusting details of a divorce case."⁸³ These cases show a tradition of judicial discretion over the right of access, not a tradition of nonaccess before the trial is completed.

2. Public Policy

All of the public policy benefits mentioned by the Court in *Richmond Newspapers* when it defined the scope of the right of access to judicial proceedings apply as well to access to pretrial documents.⁸⁴ Access serves the "monitoring" function because it would be difficult to review a judge's pretrial actions without also reviewing the documents which motivated those actions.⁸⁵ The "educational" function is furthered because the public is more likely to understand rulings and our system of justice if they may examine the documents which underlie rulings.⁸⁶ Finally, access to the documents serves a "therapeutic" function because the public can be more assured that justice is done if they can observe it in its entirety.⁸⁷

In *Reporters Committee* Judge Scalia minimized the policy benefits of public access to pretrial materials and stated that these interests were served by access after the judgment.⁸⁸ Apparently the court believed that the monitoring, educational and therapeutic benefits of the right of access would be just as strong if the access comes after the judgment. Other judges believe, however, that the public policy benefits are best served if the access is contemporaneous. In *Associated Press*, which involved a criminal proceeding, the court required immediate access: "[t]he effect of the order is a total restraint on the public's First Amendment right of access even though the restraint is limited in time."⁸⁹

Ultimately, because public interest in news is always at its highest when the news is fresh,⁹⁰ reason shows that the right of access is most effective if it is contemporaneous. Review of the participants will be stronger if it occurs while the pretrial motions are pending.⁹¹ In addition, the goal of

82. See *id.*

83. *In re Caswell*, 18 R.I. 835, 836 (1893), cited in *Reporters Committee*, 773 F.2d at 1333.

84. See *supra* notes 25-33 and accompanying text.

85. See *Richmond Newspapers*, 448 U.S. at 592.

86. See *id.* at 572, 595.

87. See *id.* at 571. See also *Brown & Williamson*, 710 F.2d at 1179.

88. "Contemporaneity of access to written materials does not significantly enhance [the] ability to assess the proper functioning of the courts." *Reporters Committee*, 773 F.2d at 1337.

89. *Associated Press*, 705 F.2d at 1147. See also *Reporters Committee*, 773 F.2d at 1334 (Wright, J., dissenting) ("the question of timing can rise to constitutional magnitude").

90. *Bridges v. California*, 314 U.S. 252, 268 (1941) ("It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist.').

91. This is the "monitoring" function. See *supra* notes 25-28 and accompanying text.

encouraging honesty, which should apply to the contents of documents as well as to the testimony at a hearing, would be hampered if the documents were not reviewed by the public for a long time, or even not at all.⁹² The public is more likely to be illuminated about the judicial process, and thus educated about our system of self-government,⁹³ if they can observe it as it actually occurs. Much of today's civil litigation takes years to complete; the benefits of a right of access would be frustrated if the public were required to wait this long before they could review the pretrial documents.⁹⁴

IV. LIMITING RIGHT OF ACCESS TO PRETRIAL DOCUMENTS

In *Richmond Newspapers*⁹⁵ and its progeny,⁹⁶ the Supreme Court stressed that the right of access to criminal proceedings is not absolute.⁹⁷ Likewise, all courts which recognize a right of access to pretrial documents believe that it is not absolute.⁹⁸ The right should be limited for two reasons: first, none of the public policy benefits of access accrue from the release of documents very remote to the litigation; and second, other interests may override the right of access. Because of the difficulty of evaluating the interests in access and nonaccess, courts have applied balancing tests.⁹⁹ The balancing tests which have been used in the past, however, gave judges much discretion without adding guidance.¹⁰⁰ A sliding scale balancing test would alleviate part of this problem. To apply this test the first step would be to ascertain the relationship of the documents to the dispute. This establishes how strong the presumption in favor of access should be. The next step would be to weigh the interests in favor of nondisclosure in light of that presumption.

A. *Relationship to Dispute: Sliding Scale*

In the early stages of litigation, many of the materials produced through discovery prove ultimately to be irrelevant to the dispute.¹⁰¹ It would be a

92. See *Richmond Newspapers*, 448 U.S. at 596-97 (Brennan, J., concurring).

93. The "educational" function. See *supra* notes 29-32 and accompanying text.

94. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 39 (C.D. Cal. 1984).

95. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

96. See *supra* notes 34-42 and accompanying text.

97. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984); *Richmond Newspapers*, 448 U.S. at 586 (Brennan, J., concurring in the judgment).

98. See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1313 (7th Cir. 1984); *In re Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 38 (C.D. Cal. 1984).

99. See, e.g., *Continental Illinois*, 732 F.2d at 1313; *Petroleum Products*, 101 F.R.D. at 41; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 901 (E.D. Pa. 1981).

100. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983).

101. *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208-09 (1984).

hardship on the producing party to expose irrelevant documents, which may contain sensitive or embarrassing information, to the public merely because that person had the misfortune of becoming a party to a lawsuit.¹⁰² Thus, it becomes difficult to decide to which documents the right of access should attach.¹⁰³ This task is especially difficult since every lawsuit is different and each document occupies a unique position in the dispute.

One case, *Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*,¹⁰⁴ attached the right of access only to documents the judge expressly relied upon, believing this would satisfy the monitoring and educational goals of the right of access.¹⁰⁵ This approach is reasonable, but at times it could be incomplete—as the district court in *In re Petroleum Products Antitrust Litigation*¹⁰⁶ noted, “documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge’s decision.”¹⁰⁷ Unfortunately, while pointing out the *Zenith* decision’s weakness, *Petroleum Products* did not offer a solution. Without allowing access to all documents, even the irrelevant ones, it would be impossible to determine which documents the judge “*should*” have relied upon but did not. The judge cannot be trusted to make this determination himself—he would be unlikely to admit there was relevant information he did not consider in making his decision.

A sliding scale test would be an effective way to deal with the different natures of pretrial documents. Since two important goals of the right of

In *Rhinehart*, a newspaper, which was a defendant to a defamation action, was prohibited from disseminating information within documents it had obtained from its opponent through discovery. *Id.* at 2202-04, 2207-08. The Court stated: “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” *Id.* at 2207. This statement seems to preclude a right of access to pretrial documents—a close reading of *Rhinehart*, however, shows that this is not the case. Even though the Court used the language of the right of access, it decided this case based upon free speech principles. The Court felt that in this case the trial judge properly limited the defendant’s freedom of speech because the interests in orderly discovery were greater than the defendant’s first amendment right to disseminate the information. *Id.* at 2208. See *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) (Judge Scalia states nonapplicability of *Rhinehart* to right of access issue).

The *Rhinehart* decision does have implications upon the right of access issue, however. Justice Brennan, in *Richmond Newspapers*, implied that the right of free speech is even greater than the right of access to judicial proceedings. 448 U.S. at 587. If, in a case like *Rhinehart*, a party has no right of free speech to disseminate information within discovered documents, it would be unreasonable to allow the public, a third party, to examine the documents in the courthouse. Thus, if a party demonstrates a valid reason to limit his opponent’s freedom of speech, he has also effectively demonstrated a reason to limit the right of public access.

102. *Rhinehart*, 104 S. Ct. at 2208-09.

103. *Zenith*, 529 F. Supp. at 897; *Petroleum Products*, 101 F.R.D. at 42-43.

104. 529 F. Supp. 866.

105. *Id.* at 900-01.

106. 101 F.R.D. 34.

107. *Id.* at 43 (emphasis in original).

access are monitoring the judge¹⁰⁸ and educating the public,¹⁰⁹ a strong presumption of access should attach to any documents upon which the judge relied. We should also take advantage of the fact that our adversarial system pressures parties to bring relevant information before the court; almost as strong a presumption of access should attach to documents to which the litigants, in the proceedings, have referred.¹¹⁰ This would ease the fears of judicial negligence pointed out in *Petroleum Products*. Finally, the presumption of access to documents to which neither the judge nor the parties have referred should be weak, unless there are indications that the parties have not vigorously prosecuted their claims.

The proposed sliding scale test can be used in conjunction with a balancing test to determine when claims of an interest in confidentiality should prevail.

B. *Interests in Confidentiality: Balancing Test*

Because the right of access to pretrial documents has a constitutional dimension, the burden should be on the party seeking to restrain that right.¹¹¹ Such a party's burden is not easy: "doubts must be resolved in favor of the Newspapers."¹¹² The *Zenith* court set out a comprehensive balancing test. First, the party seeking confidentiality must specifically show why the documents should remain private.¹¹³ Second, that party must show that a less restrictive means, such as exclusion of a part of the documents, would not also effectively meet the confidentiality concerns.¹¹⁴ Third, the party must show that a protective order will protect the confidentiality interest.¹¹⁵ After the party seeking confidentiality satisfies these steps, the judge will determine whether the claims of confidentiality have overcome the presumption of a right of access to the documents. Although every case will be unique, certain factors which lead to a ruling either for or against public access frequently recur and should be examined.

1. Public Interest in Documents

Three courts, in deciding to grant access to pretrial documents, were influenced by the particular public interest in their disputes—both in its

108. See *supra* notes 25-28 and accompanying text.

109. See *supra* notes 29-32 and accompanying text.

110. *Accord Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979) ("In short, our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation.").

111. *Petroleum Products*, 101 F.R.D. at 43.

112. *Continental Illinois*, 732 F.2d at 1313.

113. *Zenith*, 529 F. Supp. at 914. See also *Petroleum Products*, 101 F.R.D. at 43.

114. *Zenith*, 529 F. Supp. at 914. See also *Brown & Williamson*, 710 F.2d at 1179.

115. *Zenith*, 529 F. Supp. at 915.

subject matter and in the identity of the parties. In *Petroleum Products*, the action was brought by the attorney generals of several states who charged major oil companies with conspiring to create the oil shortage in the 1970's.¹¹⁶ The court allowed access, stating that not only were millions of Americans affected if the charges were true, but that since the charges were brought by state officials, the public would want to observe how well they prosecuted the claims.¹¹⁷ Likewise, in *Zenith*, an antitrust action, and *Brown & Williamson Tobacco Corp. v. F.T.C.*,¹¹⁸ a suit brought by a tobacco manufacturer challenging F.T.C. regulations concerning the content of pollutants in cigarettes, the controversies involved millions of consumers.¹¹⁹ Plus, in *Zenith*, because of the nature of the action, the plaintiffs had the responsibility to "vindicate societal interests as well as their own."¹²⁰ These cases demonstrate that when such societal concerns are present, the presumption of a right of access is almost insurmountable.

2. Interest in Confidentiality

There are several legitimate reasons to deny public access to certain pretrial documents. The documents may contain information relating to national security, confidential investigative information¹²¹ or evidentiary privileges.¹²² Likewise, the right to a fair trial and the need to keep the proceedings orderly may demand limiting the right of access to documents.¹²³

In much of today's civil litigation, a party seeking confidentiality will try to shield the contents of documents by claiming they contain trade secrets.¹²⁴ Both the common law¹²⁵ and Federal Rule of Civil Procedure 26(c)(7)¹²⁶

116. *Petroleum Products*, 101 F.R.D. at 36-37.

117. *Id.* at 39.

118. 710 F.2d 1165. See *supra* text accompanying notes 64-65.

119. *Zenith*, 529 F. Supp. at 905; *Brown & Williamson*, 710 F.2d at 1180 ("The subject of this litigation potentially involves the health of [all] citizens" who smoke cigarettes.) See also *Petroleum Products*, 101 F.R.D. at 39 ("If these charges prove true, the defendant's illegal conduct has affected the lives of all Americans.").

120. *Zenith*, 529 F. Supp. at 905.

121. *Fenner & Koley*, *supra* note 3, at 441-43.

122. The *Continental Illinois* court wrestled with claims of attorney-client privilege. *Continental Illinois*, 732 F.2d at 1314.

123. In *Richmond Newspapers*, 448 U.S. at 600, Justice Stewart said that there are "time, place, and manner restrictions upon the exercise of the First Amendment freedoms." Thus, for example, a right of access to judicial proceedings can be limited by such things as the available space in the courtroom. See generally *Nixon v. Warner Communications*, 435 U.S. 589, 608-10 (1978).

124. See, e.g., *Reporters Committee*, 773 F.2d at 1326; *Petroleum Products*, 101 F.R.D. at 36.

125. See *Zenith*, 529 F. Supp. at 895. See also *Reporters Committee*, 773 F.2d at 1330.

126. Federal Rule 26 reads, in relevant part:

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 person . . . [such] that a trade secret . . . or commercial information not be disclosed or be disclosed only in a designated way

FED. R. CIV. P. 26(c)(7).

recognize that commercial enterprises have an interest in keeping sensitive information confidential. This claim to confidentiality is often abused, however.¹²⁷ Courts should closely examine a business's claim that documents contain trade secrets. "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."¹²⁸ A company seeking nondisclosure of its documents cannot meet its burden merely by showing its public relations will be injured.¹²⁹

C. *Administrative Burdens*

If a trial judge is not careful, the right of access could lead to great administrative burdens. In a large, complex case, document-by-document rulings by the court could take years.¹³⁰ This threat can be alleviated if the courts remember that the burden is upon the party seeking confidentiality.¹³¹ In his dissent in *Reporters Committee*, Judge Wright reasonably said that if a party waits until the eve of the trial to file documents, and if it would be disruptive to examine them one by one, then that party should bear the consequences—the documents should be disclosed.¹³² Furthermore, Federal Rules of Civil Procedure 16 and 26 give the trial judge the authority to "manage" the parties in the pretrial stage.¹³³ Thus, judges can work to prevent being deluged with paper from parties who wait too long to file or who claim an excessive number of documents are confidential.

CONCLUSION

If the sliding scale balancing test proposed by this Note were applied to the facts of *Reporters Committee*,¹³⁴ the court would probably have to allow access. Since the documents in question there were used at trial or were submitted to the judge in connection with a motion for summary judgment,

127. For example, *Reporters Committee*, 773 F.2d at 1326-28, reports that in that case over 3800 pages of depositions and numerous documents were temporarily protected from disclosure because Mobil claimed they contained trade secrets. Ultimately, every item was disclosed. Mobil even tried to limit access to documents actually used at the trial even though those same documents were already available to the public through other means, and thus not secret at all.

128. *Brown & Williamson*, 710 F.2d at 1179.

129. *Petroleum Products*, 101 F.R.D. at 40.

130. *Reporters Committee*, 773 F.2d at 1338, 1341.

131. See *supra* note 110 and accompanying text.

132. *Reporters Committee*, 773 F.2d at 1345 (Wright, J., dissenting) ("constructive waiver").

133. The 1983 amendments to the federal rules require district courts to take an active role in discouraging discovery abuse. "The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." FED. R. CIV. P. 26(b) advisory committee's notes. See *supra* note 47.

134. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985).

a strong presumption of openness would attach to them. Although some of the documents may have contained trade secrets, that is not a good enough reason to seal them all. Plus, there was no showing that less restrictive measures were not possible. Because the party seeking confidentiality waited until just before trial to bring its confidentiality claims before the court, it should have to bear the consequences of the court not having time to rule on each document.

The majority in *Reporters Committee* chose to minimize the right of access to pretrial documents. Although confusion about the right of access to judicial proceedings is understandable, it is regrettable that this decision works to deprive the public of valuable information about our system of laws. It would have been possible for the court to fashion a solution so that both the public's and the parties' interests were served. Unfortunately, that was not the case.

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