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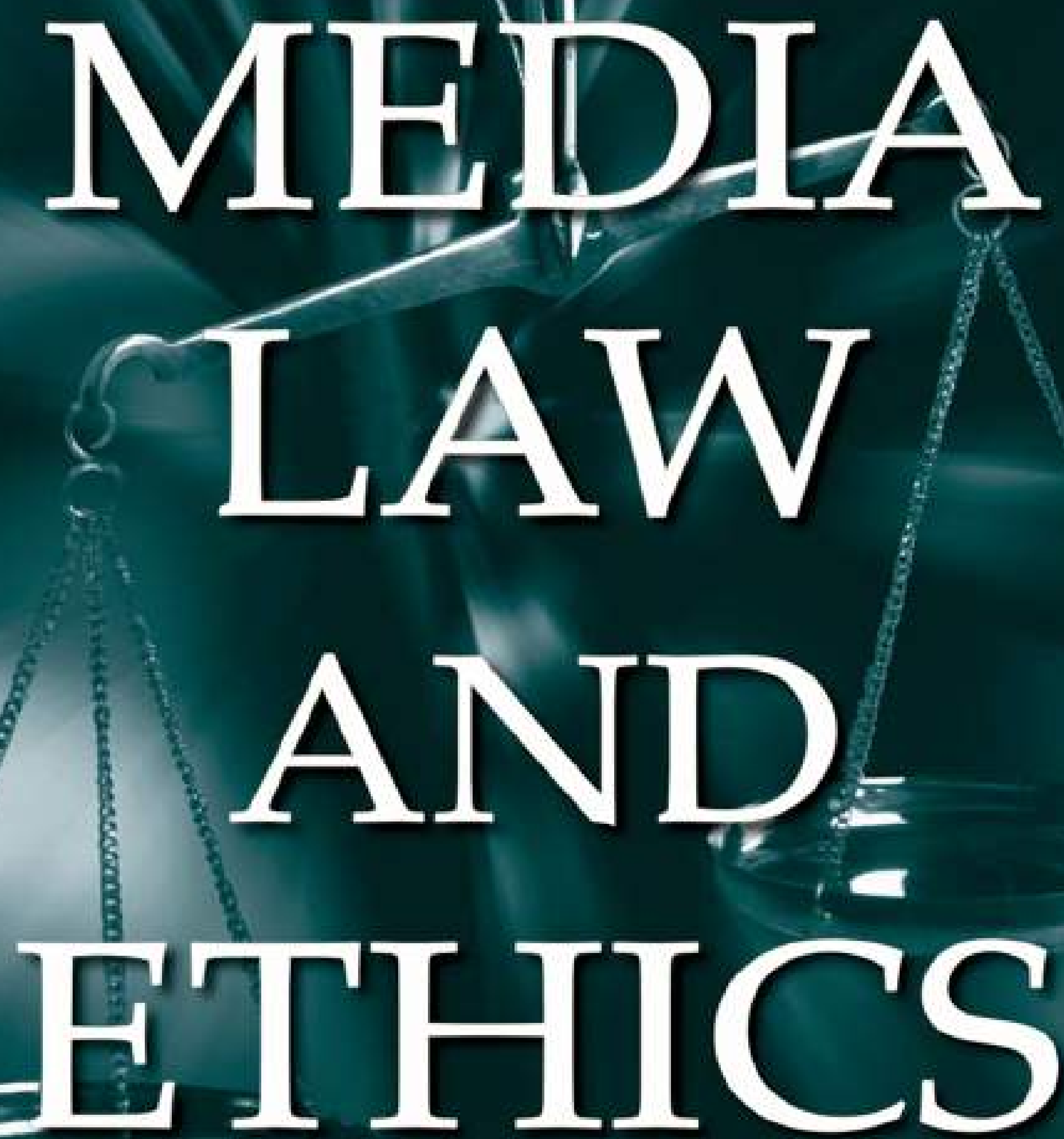

Media Law and Ethics

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CHAPTER

11

Press and Public Access to the Judicial Processes, Records, Places, and Meetings

My relationship doesn't fall under the Freedom of Information Act. I keep it to myself. I don't think it's too much to ask.

—Actress Julia Roberts[1]

The First Amendment protects the press in two important areas. First, the government cannot interfere with the publication of material except under unusual circumstances such as when national security is at stake. Second, publishers generally do not have to fear criminal sanctions. However, the U.S. Supreme Court has never explicitly recognized a First Amendment right to gather information.

In those rare instances in which the Court has enunciated the rights of the media to have access to information, places, or events such criminal trials, the Court has done so on the ground that the press acts as a surrogate for the public. The Court clings to the principle that the press can claim no greater rights of access than those afforded the public under the U.S. Constitution. Thus the press faces the unfortunate dilemma of having broad freedom to publish but considerably less freedom to ferret out the truth. The situation may be due largely to the fact that the press at the time the Constitution was written consisted primarily of "party organs" financed by political and other special interest groups that had little concern with objectivity, fairness, and truth. They were simply seeking to inform and influence their constituents and to criticize their opponents, not necessarily to serve as a watchdog over the government.

In the 1970s, the doors to records, places, and especially the judicial process began to open, thanks to a series of U.S. Supreme Court rulings and a flurry of state and federal freedom of information statutes. This chapter reviews the progress as well as the limits journalists face in seeking information. It also explores the parallel ethical problems that sometimes call for self-restraint even when the law permits access and disclosure.

Access to Judicial Processes and Judicial Records

As we explore access to the judicial process and judicial records, you will see that the U.S. Supreme Court—as do most other courts—generally looks to what media law attorneys Dan Paul, Richard Ovelmen, and Enrique D. Arana call two "complementary" considerations. First, has the particular judicial process "been historically open to the public"? Second, would access "contribute to the self-governing function and further the democratic process"?[2] Let's begin with criminal trials.

Richmond Newspapers v. Virginia (1980): Criminal Trials

Since the adoption of the Bill of Rights in 1791, the Sixth Amendment has guaranteed, among other rights, the right of a criminal defendant "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The U.S. Supreme Court has wrestled for more than two centuries with issues such as the criteria for an impartial jury[3] and the meaning of *speedy*, but the Court never directly acknowledged a constitutional right of public access to judicial proceedings until 1980 when the justices held 7 to 1 in *Richmond Newspapers v. Virginia*[4] that the First and Fourteenth Amendments guarantee the press and the public the right to attend criminal trials. According to the Court, the right is not absolute, but "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."

The case involved a defendant who was being tried for the fourth time on a murder charge. The first trial had been reversed on appeal and the two subsequent trials were declared mistrials. When the defense attorney moved that the trial be closed, the state trial court judge granted the request. Neither the prosecutor nor the two newspaper reporters who were present in the courtroom at the time objected to the closure. However, the reporters did file a motion later that day, asking that the order be vacated, but the judge denied the request. The following day, the judge granted a motion by the defense to strike the prosecution's evidence. He then dismissed the jury and ruled the defendant was not guilty. All during this time, of course, the proceedings were closed to the press and to the public. The Virginia Supreme Court dismissed the appeal by the newspaper that the judge's closure order be overturned.

One aspect of the Supreme Court's decision that was puzzling to some journalists was that, with six different opinions among the seven justices in the majority, there was no clear indication whether the issue was a First or a Sixth Amendment

right. Chief Justice Warren Burger was joined by Justices Byron White and John Paul Stevens in the Court's holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of speech and 'of the press could be eviscerated'" (citing *Branzburg v. Hayes*, 1972).[5]

In separate opinions, Justices White, Stevens, Potter Stewart, and Harry Blackmun each explained why they voted to reverse the decision of the state appellate court that upheld the trial court judge's decision to close the trial. In his three-sentence concurring opinion, Justice White criticized the Court for not having recognized the right to attend criminal trials under the Sixth Amendment one year earlier in *Gannett Co. v. DePasquale* (1979).[6] In his separate concurring opinion, Justice Stevens characterized the case as a "watershed" but chided the Court for not recognizing a right of access in *Houchins v. KQED*[7] two years earlier. In *Houchins*, the Court had ruled in a plurality opinion written by Chief Justice Burger that the First and Fourteenth Amendments do not grant the press the right of access to a jail that is "different from or greater than" the right enjoyed by the public. Thus the Court held that a sheriff could deny a TV station access to the portion of a jail where a suicide had occurred because he had also excluded the public from such access.

In his separate concurring opinion, Justice Blackmun stuck to his view earlier in *Gannett Co. v. DePasquale* that the right to a public trial could be found explicitly in the Sixth Amendment but that "the First Amendment must provide some measure of protection for public access to the trial."[8] Justice Stewart argued in his concurring opinion that the First and Fourteenth Amendments clearly grant the public and the press the right of access to both civil and criminal trials. Justice William J. Brennan, Jr., joined by Justice Thurgood Marshall, said in his lengthy concurring opinion that the First Amendment barred judges and the parties from having sole discretion in closing criminal trials.

The lone dissenter, Justice William Rehnquist, said he could find no prohibition against closing a trial to the public and the press anywhere in the Constitution, including the First, Sixth, Ninth, or any other amendments. Justice Rehnquist would instead defer to the states and to the people to make the judgment of whether trials should be open. He made no reference to the meaning of "public trial" under the Sixth Amendment, although he had joined the majority in *Gannett Co. v. DePasquale,* which held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[9]

The Court tackled three more major cases dealing with right of access to the judicial process after *Richmond Newspapers v. Virginia,* and in each case found a constitutional right, but continued to quibble over the origins of the right. The result was confusion over whether the right arises from the Sixth Amendment or the First Amendment.

The Court is not the only body ambivalent about opening the judicial process to press and public scrutiny. Lawyers, judges and the public are split on the issue as well. Some judges have little hesitation in closing criminal trials and pretrial proceedings to the public and the press, whereas others take extraordinary measures to

ensure public access while protecting the rights of the defendant. First Amendment attorneys generally favor open trials and open proceedings, and criminal defense lawyers are sometimes more comfortable with closed proceedings, especially in highly visible cases that are likely to attract media attention

Why are courts so concerned with open proceedings? The most common fears are (a) a public trial can bias jurors and thus prevent a defendant from receiving a fair trial; (b) the presence of the news media will seriously affect the courtroom decorum and ultimately the judicial process; and (c) extensive publicity may adversely affect the defendant and other witnesses, including the victim. Justice Rehnquist raised none of these issues in his lone dissent. Instead, he based his decision on the idea that the Court had no constitutional authority to review lower court decisions in such cases.

There are some major societal benefits to open trials. First, an open trial can go a long way toward ensuring that a defendant does get a fair trial by subjecting the whole process to public scrutiny. Secret justice may not be justice served. In his concurring opinion, Justice Brennan (joined by Justice Marshall) emphasized this point:

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[10]

Without question, a judge is far less likely to violate a defendant's constitutional rights under the light of public and press scrutiny than in a closed courtroom in which no one other than the lawyers can take the judge to task. Of course, journalists have no right to directly intervene in the proceedings, but they can certainly inform the public when the rules of evidence or procedure are not properly followed, for example, or when an attorney appears to be incompetent. Simply providing a blow-by-blow account of the trial is, in and of itself, an important service for the public. Only journalists can effectively do that.

Second, we have a tradition in the United States of openness in the judicial process as a means of demonstrating that the public has a stake in the trial. After all, public funds are involved in almost every aspect of a trial from the judge's salary to the operation of the courtroom itself, and, in the case of a criminal trial, the state or the public is the entity against which the alleged crime has been committed. Justice Brennan invoked history several times in his concurring opinion, pointing out that public trials are rooted in our English common law heritage. "As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation," according to Justice Brennan. This ties in with the idea that there is "an historical presumption of access," as Paul et al. note.[11]

Do public trials prevent jurors from rendering impartial verdicts, and, if so, would closing trials ensure unbiased decisions? Some criminal trials attract so much pretrial media attention that the courts automatically assume that extraordinary measures must be taken even during *voir dire*. One example is the O.J. Simpson criminal trial in 1995 in which the ex-professional football player was acquitted of the murders of his ex-wife, Nicole Simpson Brown, and her friend, Ronald Goldman. Another example is the 1997 trial of Timothy McVeigh, who was sentenced to death by a jury and executed four years later for his role in the Oklahoma City bombing of the Alfred P. Murrah Federal Building that resulted in the deaths of 168 children and adults. The Simpson murder trial was televised, while McVeigh's trial was not. In both cases, thousands of news stories appeared about each defendant, and hundreds of potential jurors were questioned during *voir dire* before final panels were selected. Most individuals were dismissed as potential jurors because they indicated they had seen and heard some of the massive publicity and thus were presumably biased.

Nebraska Press Association v. Judge Stuart (1976)

The principles laid down by the Court in *Near v. Minnesota* (1931)[12] and *Nebraska Press Association v. Judge Stuart* (1976)[13] effectively restrict judges from exercising control over pretrial and during-trial publicity, although they can certainly control what takes place in the courtroom. In *Near,* the Court said that the government could impose prior restraint against the press only in exceptional circumstances, such as obscene publications or a potential violation of national security. In *Nebraska Press Association,* the Court unanimously held that a state trial court judge's restrictive order on the news media was unconstitutional because the judge had failed to exhaust other measures for ensuring a fair trial short of prior restraint: "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."[14]

In a law review article entitled "Who Is an Impartial Juror in an Age of Mass Media?" Newton Minow and Fred Cate concluded:

> To think that jurors wholly unacquainted with the facts of a notorious case can be impaneled today is to dream. Anyone meeting that standard of ignorance should be suspect. The search for a jury is a chimera. It is also unnecessary. Knowledgeable jurors today, like 800 years ago, can form an impartial jury. In fact, the very diversity of views and experiences that they possess is the best guarantee of an impartial jury.[15]

The authors note that in 12th century England where the jury system was invented, an individual had to be familiar with the parties as well as the circumstances in the case before he was eligible. Strangers could not serve.

In an indirect way, the U.S. Supreme Court has agreed with the premise that knowledgeable jurors can be impartial. In *Murphy v. Florida* (1975),[16] the Court held that Jack Roland Murphy, known as "Murph the Surf," was not denied a fair trial even though members of the jury that convicted him of the 1968 robbery of a Miami home had learned of the defendant's prior felony conviction and other facts from news stories. Murphy unsuccessfully argued that the extensive media coverage he received primarily because of his flamboyant life style and his earlier conviction for stealing the Star of India sapphire prejudiced the jury. Murphy cited *Irvin v. Dowd*,[17] *Rideau v. Louisiana*,[18] *Estes v. Texas*,[19] and *Sheppard v. Maxwell*[20] to support his contention that "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced."[21] In each of these cases, the Supreme Court reversed a criminal conviction in state court "obtained in a trial atmosphere that had been utterly corrupted by press coverage."[22]

According to the majority opinion written by Justice Thurgood Marshall, the "constitutional standard of fairness requires that a defendant have 'a panel of impartial, indifferent jurors," but "[q]ualified jurors need not, however, be totally ignorant of the facts and issues involved."

The Court had no difficulty distinguishing this case from *Dowd, Rideau, Estes,* and *Sheppard*. It noted that, at the trial, Murphy did not object to the jurors selected and that he did not cross-examine any of the prosecution witnesses. His objections came after he had already been convicted. Furthermore, the Court noted, when it reviewed the *voir dire* transcript, it could find only one bit of dialogue that showed any possibility of partiality by a juror. That involved a juror who had said, in response to a hypothetical question, that his prior impressions of the defendant could dispose him to convict. The Court found the incident insignificant, however, given that the man was asked leading questions by the defense and that his other testimony indicated that "he had no deep impressions" of the accused.

Dowd was different, the Court said, because "the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity immediately prior to trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence."[23]

In *Rideau,* the Court pointed out, a confession by the defendant had been broadcast three times by a local television station. "*Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival," according to the Court. Finally, the trial in *Estes* took place in "a circus atmosphere" with journalists allowed to sit within the bar of the court, which was overrun with television cameras.[24]

Irvin v. Dowd (1961)

In *Irvin v. Dowd* (1961), the Court held unanimously that "Mad Dog Irvin" (as he was known in the press) had been denied Fourteenth Amendment due process and

thus was entitled to a new trial. Under the Fourteenth Amendment all citizens are guaranteed fair procedures when state action is involved, and they are protected against unfair taking of their property by the state. Irvin's complaint was that proper procedures were not followed during his trial.

The U.S. Supreme Court vacated the decision by the Seventh Circuit U.S. Court of Appeals, which had turned down Irvin's request for a writ of habeas corpus. The Supreme Court pointed to the fact that 8 of the 12 jurors in the case had indicated during *voir dire* that they thought he was guilty of the murder for which he was being tried. Although he was tried and convicted of one murder, Irvin was supposedly linked to six murders. All eight of the jurors said they were familiar with the facts and circumstances, including Irvin's confession to six murders. They had acquired this information from the massive press coverage the story received, but all 12 told the judge they could still be impartial and fair. As the Court noted:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner [Irvin], but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[25] [citations omitted]

The barrage of publicity in the immediate vicinity where Irvin was tried included stories about crimes he had committed as a juvenile, about convictions 20 years earlier for arson and burglary, and about a court-martial on AWOL charges during the war. There were also headlines about his police lineup identification, a planned lie detector test and, of course, his confession. Many of the news stories characterized the defendant as the "confessed slayer of six." One story described him as remorseless and having no conscience but noted that he had been declared sane by his court-appointed physicians.

Rideau v. Louisiana (1963)

In *Rideau v. Louisiana* (1963), the Court reversed the death penalty of Wilbert Rideau, convicted of armed robbery, kidnapping, and murder. Rideau was accused of robbing a bank in Lake Charles, Louisiana, in 1961, kidnapping three bank employees and killing one of them. The Court held that his right to due process had been violated because the state trial court refused to grant a change of venue.

Most people in Calcasieu Parish, including the jurors, had seen a film broadcast three times on television in which the defendant confessed to the sheriff in a 20-minute interview, without benefit of an attorney, that he had committed the alleged crimes. The Court was concerned because three members of the jury said during *voir dire*

that they had seen the televised confession at least once. Further, two members of the jury were deputy sheriffs of the parish in which the trial occurred. The Court harshly criticized the trial proceedings:

> The case before us does not involve police brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a "trial" of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute."[26] [footnotes omitted]

The story of Wilbert Rideau did not end with the U.S. Supreme Court decision. Rideau was tried, convicted and sentenced to death again a year later by another all-white, all-male jury. However, a U.S. Court of Appeals overturned that decision on the basis that the prosecution had struck several potential jurors because of their perceived opposition to the death penalty. A third trial in 1970 by another all-white, all-male jury also resulted in the death penalty. The Louisiana Supreme Court overturned the death penalty but allowed the conviction to stand. Several years later Rideau become editor of the Louisiana State Penitentiary magazine, *The Angolite,* which won several journalistic awards under his editorship.

Rideau went on to become what many considered a model prisoner, including producing or co-producing several award-winning documentaries and co-authoring a book on criminal justice. Despite being recommended four times over the years by the state pardon board for release, he remained in prison. In 2000 he won the right to another trial—thanks to a decision by the Fifth Circuit U.S. Court of Appeals in New Orleans. He was re-indicted 18 months later and then tried again in January 2005 by a racially diverse jury that convicted him of manslaughter. After the court sentenced him to the 44 years he had already served, he left the courtroom a free man.[27]

Estes v. Texas (1965)

The circumstances compelling the Supreme Court to overturn the swindling conviction of the petitioner in *Estes v. Texas* (1965) involved more than simply jury prejudice. The Court held that the Fourteenth Amendment due process rights of financier Billy Sol Estes had been violated primarily because of the publicity associated with a pretrial hearing, that had been carried live on both television and radio. Some portions of the trial were also broadcast,[28] and news photography was permitted throughout the trial.

The Court was clearly unhappy with the massive pretrial and during-trial publicity, but its greatest concern was the presence of cameras at the two-day pretrial hearing, which included at least 12 camera persons continually snapping still pictures or recording motion pictures, cables and wires "snaked across the courtroom floor,"

three microphones on the judge's bench, and others aimed at the jury box and the attorney's table. By the time of the trial, the judge had imposed rather severe restriction on press coverage, and the trial was moved about 500 miles away. The Supreme Court did hint that cameras would return someday to the courtrooms:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.[29]

Chandler v. Florida (1981): Cameras in the Courtroom

The facts indeed did change as the technology changed, leading the court to rule in *Chandler v. Florida*[30] 16 years later that a state could permit broadcast and still photography coverage of criminal proceedings because cameras and microphones in courtrooms were no longer inherent violations of a defendant's Fourteenth Amendment rights, contrary to the holding in *Estes v. Texas*. The majority opinion in *Estes* cited four major reasons for banning cameras from the courtroom: (a) the negative impact on jurors, especially in biasing the jury and in distracting its members; (b) impairment of the quality of the testimony of witnesses (the idea that witnesses may alter their testimony when cameras and mikes are present); (c) interference with judges in doing their job; and (d) potential negative impact on the defendant, including harassment. As the Court noted:

> Trial by television is . . . foreign to our systems. . . . Telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney–client relationships and the temptation offered by television to play to the public office might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses.[30] [citation omitted]

Both the First Amendment Center at Vanderbilt University and the Radio–Television News Directors Association (RTNDA) maintain online state-by-state summaries of restrictions on courtroom news coverage.[31] According to the First Amendment Center compilation, among the 50 states and the District of Columbia, only the latter expressly bans both appellate and trial court electronic news. The summary also notes that 16 states allow only appellate court coverage, 15 states have restrictions barring coverage of certain types of cases or coverage of witnesses who object to being recorded, and 19 states permit news coverage in most states.[32] In its state-by-state guide to cameras in the courtroom, RTNDA divides coverage into three tiers. The first tier ("states that allow the most coverage") includes 19 states. Some 15 states fall into the second tier ("states with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony"). The remaining 16 states are in the third tier ("states that allow appellate coverage only, or that have such restricting trial coverage rules essentially preventing coverage").[33]

Thus, in spite of enormous advances in communication technology and with public attitudes now more favorable toward such coverage, general bans still remain in several states and in the federal system. The most restrictive states include two of the most populous—Illinois and New York. In *Courtroom Television Network v. State of New York* (2005),[34] the New York Court of Appeals, the state's highest appellate court, ruled 7 to 0 that there is no state constitutional right to televise court proceedings. The court upheld the constitutionality of Civil Rights Law Section 52 that bans audiovisual coverage of most courtroom proceedings in New York. According to the court:

> Civil Rights Law Section 52 does not prevent the press, including television journalists, from attending trials and reporting on the proceedings. What they cannot do under the statute is bring cameras into the courtroom. This is not a restriction on the openness of court proceedings but rather on what means can be used in order to gather news. The media's access is thus guaranteed. But it does not extend to a right to televise those proceedings.[35] [citation omitted]

Ironically, audiovisual coverage was allowed in New York for almost a decade, ending in 1997 when the state statute expired. In 2005 the Illinois Supreme Court dismissed without comment a petition from various news organizations to allow electronic coverage of trials.[36]

When the Court TV cable network debuted in mid-1991, there were no outcries of sensationalism or complaints about lack of due process. Indeed, the network had an enormous variety of civil and criminal trials from which to choose to fill its 24-hour programming. The network got a particularly significant boost in its ratings with the O.J. Simpson criminal trial in 1994–1995, as did CNN and other cable networks that also broadcast the murder trial.

Through improved television access to the courts and growing viewer appetites for courtroom drama, Court TV has done well, both financially and in the number of viewers. When he appeared before the U.S. Senate Judiciary Committee in November 2005, Henry Schleiff, chair and CEO of the network, pointed to a variety of cases the network had carried that he said demonstrated the value of televised court proceedings. He said the network had already covered more than 900 cases including the 2000 broadcast of the trial of four New York police officers accused of firing 41 bullets in the slaying of unarmed West African immigrant Amadou Diallo. The officers claimed they thought the victim was reaching for a weapon at the time of the shooting. They were acquitted by the jury.

In his testimony before the Judiciary Committee, Schleiff noted that "the public's acceptance of the verdict was widely attributed to the fact that the public had been able to watch and listen to the proceedings unfold with their own eyes and ears."[37] Other cases he cited included a live telecast from Las Vegas of the trial of a former topless dancer and her beau who were accused of forcing heroin down the throat of a former casino owner and then digging up millions of dollars worth of silver their victim had stored in an underground vault. Both defendants were convicted.

Court TV coverage also included cases involving children such as 15-year-old Christopher Pittman who claimed his use of the Zoloft antidepressant led him to

murder his grandparents when he was 12. Prosecutors argued at the 2005 trial that it was the grandparents' discipline of the boy after an incident in which he had choked another child on a school bus that led to the murders. Pittman was convicted and given 30 years in prison. In the same year, the network broadcast the trial of 80-year-old Edgar Ray Killen for the 1967 murders of three civil rights workers. The defendant claimed he was at a wake at the time of the killings, but the prosecution successfully argued that he coordinated the crimes. He was found guilty of manslaughter.

Schleiff concluded his comments by arguing for televised coverage of U.S. Supreme Court oral arguments. Over the years, including during the dispute over the 2000 presidential election, the Supreme Court has permitted the delayed but same-day broadcasts of audio recordings of a few historic cases. However, the Court still bans video cameras and live coverage. "The American people deserve to see their judicial system in action, at all levels," according to Schleiff. "The American people deserve to see this window on a system of justice now opened and for the sun to shine in upon it. Indeed, the American people deserve to have cameras permitted in our nation's federal courtrooms."[38] So far, that has not occurred.

Thanks to high-speed technology, with the beginning of its new term on October 2, 2006, the U.S. Supreme Court began making transcripts of oral arguments available free online to anyone on the same day they are heard in court. The website is www.supremecourtus.gov. Prior to that, the transcripts were usually available online within two weeks after the oral arguments. In 2007 the Court provided digital access for the first time to videotaped evidence cited in an opinion. The link for the clip was included, with access made available via the Court's Web site. The clip featured a video recording of a high-speed police chase in Atlanta taken with a camera mounted on the dashboard of the cruiser.

In *Chandler,* two men were convicted of conspiracy to commit burglary, grand larceny, and possession of burglary tools after they were charged with breaking and entering a popular Miami Beach restaurant. (Both were Miami Beach police officers at the time of their arrests.) The trial attracted considerable media attention, and cameras were in the courtroom, as permitted under experimental Florida Supreme Court rules. The cameras were in place only during *voir dire,* during the testimony of the prosecution's chief witness, and during closing arguments. The witness was an amateur radio operator who had overheard and recorded conversations between the defendants on their police walkie-talkies while they were committing the burglary. Less than three minutes of the trial were actually broadcast.

Before the trial, the defendants had been unsuccessful in persuading the Florida Supreme Court to declare the experimental rules unconstitutional. They also could not convince the trial court judge to sequester the jury because of the television coverage, although he did instruct the jury not to watch or read anything in the media about the case. The defendants were convicted on all counts and moved for a new trial on the ground that they had been denied a fair and impartial trial because of the television coverage. The Florida District Court affirmed the convictions, and the Florida Supreme Court declined to review.

Noting that it had no supervisory jurisdiction over state courts, the U.S. Supreme Court made it clear that it was limited to whether the mere presence of media cameras in the courtroom was sufficient to deny the defendants their constitutional right to a fair trial. According to the Court, there is no prohibition in the U.S. Constitution against a state's experimental use of cameras in the courtroom.

Ironically, *Chandler v. Florida*, which recognized no constitutional right of access but merely held that the Constitution does not bar states from allowing radio, television and photographic coverage of criminal proceedings, has probably had a greater impact on opening the judicial process than *Richmond Newspapers v. Virginia*, which did recognize a constitutional right of access to criminal trials by the press and the public. The public still generally distrusts broadcast coverage of trials, as the fallout from the O.J. Simpson murder trial demonstrated in 1995, but such coverage is becoming more accepted and routine.

The federal court system has been among the least progressive in opening the courts to electronic news coverage. From 1990 to 1993 as part of a pilot program, the Judicial Conference (a 27-member federal body that determines rules and policies for the federal courts) allowed video and still camera coverage of civil proceedings in eight federal district and appellate courts, including the Second Circuit U.S. Court of Appeals in New York and the Ninth Circuit in San Francisco. By all accounts, the program was highly successful, with judges overwhelmingly saying their attitudes toward cameras in the courtroom continued to be favorable, as they had been before the experiment.[39] The committee charged with analyzing the results of the pilot recommended giving judges the authority to permit access to cameras in civil proceedings, but the Judicial Conference voted not to follow the recommendation. In 1996 the conference voted down the idea again. The Conference has allowed further experimentation by appellate courts in specific cases.[40]

Closing Criminal Trials

Are there situations in which criminal proceedings, including trials, can be closed without violating the First Amendment? *Richmond Newspapers v. Virginia* provides at least a partial answer. According to the Court, the trial of a criminal case must be open to the public, "absent an overriding interest articulated in findings."[41] The Court, however, took no pains to explain "overriding interest," but did distinguish the case from *Gannett v. DePasquale* by noting that "both the majority [which upheld the closure of a criminal pretrial hearing as constitutional] . . . and dissenting opinions . . . agreed that open trials were part of the common law tradition."[42]

Unfortunately, the justices did not overrule *Gannett v. DePasquale*, which led Justice Byron White to argue in his concurring opinion in *Richmond Newspapers v. Virginia* that the latter case "would have been unnecessary had *Gannett* . . . construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances."[43]

Richmond Newspapers was a particularly appropriate case for testing this implicit right of access in the Constitution because it involved a defendant who had

already been tried three times and specifically requested closure with no objection from the prosecution. The defendant's first conviction of second degree murder was reversed because improper evidence was introduced at trial, and the second and third trials ended in mistrials. Because the defendant asked that the trial be closed, he effectively waived his right to a public trial. Thus a First Amendment rationale was necessary if the trial were to remain open.

One of the more puzzling aspects of the decision is that the majority opinion (written by then Chief Justice Warren Burger) said it was "not crucial" to characterize the decision as "right of access" or a "right to gather information." The Court did note that the "explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."[44]

The vast majority of states forbid coverage of juvenile cases, testimony by victims of sex crimes, domestic relations (divorces, adoption proceedings, child custody disputes, etc.), trade secrets, and *voir dire*.

Sheppard v. Maxwell (1966): Prejudicial Publicity

Although it was technically not an access case, *Sheppard v. Maxwell* (1966)[45] was a watershed decision involving the Fourteenth Amendment rights of defendants, especially in highly publicized cases. It also played a major role in a movement by lower courts away from openness that began in the early 1990s. Indeed, the Court's decision served as a lightning rod for many state courts to close trials even though the justices clearly did not intend to send a message that press and public access should be restricted beyond the suggestions made for preventing a crowded courtroom.

The circumstances in the case are particularly important in understanding the Court's decision. Samuel H. Sheppard, a prominent Ohio osteopath, was tried and convicted by a jury of second degree murder after his wife, Marilyn, was bludgeoned to death in their Bay Village home in suburban Cleveland. The Supreme Court's opinion describes the case in considerable detail, but some highlights bear mentioning. Sheppard was a suspect in the murder from the beginning. He claimed that he had fallen asleep on a couch the night his wife was murdered in her bedroom, and that he had heard her cry out in the early morning. When he ran upstairs to her bedroom, he saw a "form" standing over her bed and was then knocked unconscious when he struggled with the "form." When he regained consciousness, he checked his wife and believed she was dead after he could not get a pulse. He then checked on his son, found him unharmed and chased the "form" out the door onto the lake shore, where he again lost consciousness.[46]

The publicity surrounding the case and the trial was unbelievable and on par with that in the 1934 trial of Bruno Hauptmann in the kidnap–murder of the 19-month-old son of famed aviator Charles Lindberg. The indiscretions of the press in that case led the American Bar Association three years later to adopt Canon 35, which effectively forbade broadcast coverage and still photos in courtrooms for more than four decades.

A few examples from the *Sheppard* case will give a sense of why the Court denounced the "carnival atmosphere at trial." The headlines, stories, and editorials

in the Cleveland newspapers were relentless and merciless in their accusations against the defendant. Some typical examples among the dozens cited by the Court:

1. At the coroner's request before the trial, Sheppard re-enacted the tragedy at his home, but he had to wait outside for the coroner to arrive because the house was placed in protective custody until after the trial. Because news reporters had apparently been invited on the tour by the coroner, they reported his performance in detail, complete with photographs.
2. When the defendant refused a lie detector test, front-page newspaper headlines screamed "Doctor Balks at Lie Test; Retells Story" and "'Loved My Wife, She Loved Me,' Sheppard Tells News Reporter."
3. Later, front-page editorials claimed someone was "getting away with murder" and called on the coroner to conduct an inquest: "Why No Inquest? Do It Now, Dr. Gerber." When the hearing was conducted, it took place in a local school gymnasium, complete with live broadcast microphones, a swarm of photographers and reporters and several hundred spectators. Sheppard was questioned for $5^1/_2$ hours about his actions on the night of the murder, an illicit affair, and his married life. His attorneys were present but were not allowed to participate.
4. Later stories and editorials focused on evidence that was never introduced at trial and on reports of numerous extramarital affairs, even though the evidence at trial included an affair with only one woman, Susan Hayes, the subject of dozens of news stories.
5. Sheppard was not formally charged until more than a month after the murder, and during that time the editorials and headlines ranged from "Why Isn't Sam Sheppard in Jail?" to "New Murder Evidence Is Found, Police Say" and "Dr. Sam Faces Quiz at Jail on Marilyn's Fear of Him."
6. The trial occurred two weeks before the November general election in which the chief prosecutor was a candidate for common pleas judge and the trial judge was a candidate to succeed himself. All three Cleveland newspapers published the names and addresses of prospective jurors and during the trial the jurors became media celebrities. During the trial, which was held in a small courtroom (26 by 48 feet), 20 newspaper and wire service reporters were seated within 3 feet of the jury box. A local radio station was even allowed to broadcast from a room next door to where the jurors recessed and later deliberated in the case. Each day, witnesses, the attorneys, and the jurors were photographed as they entered and left the courtroom, and although photos were not permitted during the trial itself, they were permitted during the recesses. In fact, pictures of the jury appeared more than 40 times in the newspapers.

7. The jurors were never sequestered during the trial and were allowed to watch, hear, and read all the massive publicity during the trial, which even included a national broadcast by the famous Walter Winchell in which he asserted that a woman under arrest for robbery in New York City said she was Sam Sheppard's mistress and had borne his child. The judge merely politely "admonished" the jurors not to allow such stories to affect their judgment.

As the Court summarized in its 8 to 1 decision ordering a new trial for Sheppard, "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."[47] As a result, Sheppard was denied a fair trial in violation of his Fourteenth Amendment due process rights, according to the Court. At the second trial, 12 years after the first, the physician was acquitted.

In spite of the fact that Dr. Sheppard had been the subject of highly prejudicial, intense publicity, the Court recommended remedies short of prior restraint:

> Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen. . . . The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. . . .
>
> Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. . . .
>
> Thirdly, the judge should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information was inaccurate, leading to groundless rumors and confusion.[48]

The Court also suggested other remedies, including (a) continuance or postponing the case until prejudicial publicity subsided, (b) transferring to another county not permeated by the publicity, (c) sequestration of the jury to keep its members from being exposed to prejudicial publicity, and (d) ordering a new trial if publicity threatened a defendant's due process rights after a trial has begun. It is significant that the Court did not cite restrictive (gag) orders on the press as a judicial remedy but instead favored restricting the parties, witnesses, and attorneys.

Unfortunately, many courts interpreted the *Sheppard* holding as a license to impose restrictive orders on the press anyway, prodding the Court to eventually rule out such censorship under most circumstances in a series of rulings that culminated in the decision in 1976 in *Nebraska Press Association v. Stuart*, in which the Court held that restrictive orders against the press are "presumptively unconstitutional"

and cannot be issued except in rare circumstances and then only after other measures less restrictive of the First Amendment are exhausted.

Until *Richmond Newspapers,* the Supreme Court appeared to be moving toward restricting press access to the judicial process, as witnessed by the 5 to 4 decision in *Gannett v. DePasquale*, upholding the closure of pretrial hearings. In *Pell v. Procunier* (1974)[49] and *William B. Saxbe v. the Washington Post Co.* (1974),[50] the Court decided 5 to 4 that journalists have no constitutional rights of access to prisons or their inmates beyond those enjoyed by the public. *Pell* upheld a California Department of Corrections regulation barring the news media from interviewing "specific individual inmates." Four prisoners and three journalists had challenged the rule as a violation of their First and Fourteenth Amendment rights of free speech.

According to the Court, "It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[51] The Court accepted the state's rationale that media interviews can turn certain inmates into celebrities and thus create disciplinary problems for these and other prisoners.

In *Saxbe*, issued on the same day as *Pell*, the Court upheld a federal rule similar to that of California that prohibited personal interviews by journalists with individually designated federal inmates in medium- and maximum-security prisons. The justices saw no major differences between the two regulations and noted that the federal rule "does not place the press in any less advantageous position than the public generally."[52] The *Washington Post* had filed suit after it was denied access to prisoners who had allegedly been punished for their involvement in strike negotiations at two federal facilities. In its reasoning, the Court relied heavily on *Branzburg v. Hayes* (1972),[53] which held 5 to 4 that the First Amendment grants no special privileges to journalists against revealing confidential sources or confidential information to grand juries.

Pell and *Saxbe* were basically reaffirmed four years later in a plurality opinion in *Houchins v. KQED* (1978),[54] in which the Court held that a broadcaster's First and Fourteenth Amendment rights were not violated when the station was denied access to the portion of a county jail where a suicide had occurred. According to the Court, "Neither the First Amendment nor Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Under our holdings in [*Pell* and *Saxbe*], until the political branches decree otherwise, as they are free to do, the media has [sic] no special right of access to the Alameda County Jail [the facility in question] different from or greater than that accorded the public generally."[55] The station could use other sources, the Court noted, such as inmate letters, former inmates, public officials, and prisoners' attorneys to gain the information it sought about conditions at the facility.

A number of trials since Sheppard have attracted intense, unrelenting media attention such as the Charles Manson murders, but the O.J. Simpson murder trial probably set the record for media coverage. Simpson was charged in June 1994 with

the murders of his former wife, Nicole Brown Simpson, and her friend, Ronald Goldman. All of the major proceedings were broadcast live, and nearly every major newspaper in the country carried front page stories and photos during dramatic points in the trial. An estimated 95 million viewers watched at least a portion of the bizarre June 17 Los Angeles freeway chase carried live by CNN and many TV stations, thanks to cameras mounted on helicopters.[56] The trial attracted even more viewers and set new records several times for CNN, Court TV, and the big four commercial networks—ABC, CBS, Fox, and NBC. The coverage made trial participants such as Brian "Kato" Kaelin, Deputy District Attorney Marcia Clark, Defense Attorneys Johnny Cochran and Robert J. Shapiro, and, of course, L.A. Detective Mark Fuhrman household names. In fact, the reading of the jury's verdict of acquittal had one of the largest live TV audiences in history.

Both sides in the Simpson case argued to prevent the release of some of the evidence in the case such as crime scene photographs and medical records. The trial and the events surrounding it severely tested the ethical and legal limits on the mass media, and the trial went down as one of the major media events of the century. The principles laid down by *Sheppard* and its progeny assured that Simpson got a fair trial even with the intense pretrial and during-trial publicity. There were surprisingly few clashes between the judiciary and the press over access. During the early part of the trial, Judge Lance Ito temporarily barred *The Daily News* of Los Angeles, the city's second largest newspaper, from the courtroom for publishing the details of a jury questionnaire the day before it was officially released. However, the paper was quickly allowed to return to the courtroom.

When Simpson was tried for the wrongful deaths of Brown and Goldman in the civil case in 1996 through 1997, Judge Hiroshi Fujisaki issued a blanket gag order on all participants and banned all television and radio recording from the courtroom. The trial concluded in February 1997 with a $33.5 million judgment against the defendant.

The aftermath of the Simpson trials, especially the criminal trial, was a strong backlash against the media as well as against lawyers. In California, the site of both Simpson trials, a rash of "O.J. laws" were proposed, and some of them were enacted. These included a new rule by the state Judicial Council granting trial court judges more authority to ban cameras in the courtroom as well as a new state bar association rule that severely restricts the ability of attorneys to make out-of-court comments that could influence in-court proceedings.[57] In several high profile trials held after the Simpson murder trial, trial court judges specifically cited the Simpson case as justification for banning cameras in states where cameras had become relatively routine. These included the trials of John Salvi, who was convicted for murdering two women and injuring five others at two Massachusetts abortion clinics, and of Richard Allen Davis, convicted of kidnapping 12-year-old Polly Klaas from her bedroom in her California home and then killing her.[58]

The backlash prompted American Bar Association President N. Lee Cooper to caution his fellow bar members not to "base our approach to court coverage on fears generated by isolated media trials."[59] "We must always separate problems of court coverage from problems with the courts themselves," he noted.

There may even have been some spillover from the Simpson trials into the public views about the media coverage of Independent Counsel Kenneth W. Starr's 1998 investigation of President Clinton's reported affair with 21-year-old White House intern Monica Lewinsky. Many members of the public apparently saw the news coverage as just another example of media excess, chastising the press for its intrusive reporting while, at the same time, devouring the stories focusing on the investigation. A *Washington Post* poll, for example, found that 56 percent of those surveyed thought Clinton had been treated unfairly and 75 percent said the Lewinsky story was getting too much coverage, but broadcast and cable news ratings continued to surge, as did the circulation of news magazines and newspapers such as *USA Today*.[60]

Richard Nixon v. Warner Communications (1978): Right of Access to Public Recordings

In a 1978 decision that has had limited impact on the press because of its rather unusual circumstances, the Court ruled 5 to 4 that no First Amendment rights were violated when the press was denied permission to copy, broadcast, and sell to the public recordings of White House conversations played during one of the Watergate trials. *Richard Nixon v. Warner Communications*[61] was unusual in that Warner was requesting copies of tapes that had already been played at trial but were in the custody of the Administrator of General Services under authority granted by the Presidential Recordings Act approved by Congress.

Robert K. Smith v. Daily Mail Publishing Co. (1979): Publishing Juvenile Offender Names

Exactly one year later the Court unanimously struck down as unconstitutional a West Virginia statute that provided criminal penalties for publication, without the written permission of the juvenile court, of truthful information that had been lawfully acquired concerning the identity of a juvenile offender. In *Robert K. Smith v. Daily Mail Publishing Co.* (1979),[62] the justices said the asserted state interest of insuring the anonymity of juveniles involved in juvenile court proceedings was not sufficient to override the First Amendment's restrictions against prior restraint. The Charleston (West Virginia) *Daily Mail* and the Charleston *Gazette* published the name of a 14-year-old junior high student who had been charged with shooting a 15-year-old classmate to death at school. Reporters and photographers first heard about the shooting on a police radio and then were given the alleged assailant's name by several eyewitnesses, the police, and an assistant prosecutor. After the name and photo of the teenage defendant appeared in the papers, a grand jury indicted both publications for violating the state statute, although no indictments were issued against three local radio stations who broadcast the name. (The statute applied only to newspapers, not to the electronic or other media, a deficiency duly noted by the Court in its decision.)

The holding in the case was narrow, as then Chief Justice Warren Burger indicated, because "there is no issue before us of unlawful press access to confidential judicial proceedings [citations omitted]; there is no issue here of privacy or prejudicial pre-trial publicity."[63] Indeed, Justice Rehnquist, while concurring in the judgment of the Court, noted, "I think that a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional."[64] The Court's opinion, representing the other seven justices voting in the case—Justice Powell took no part in the consideration or decision of the case—held that a state statute punishing the publication of the name of a juvenile defendant could never serve a "state interest of the highest order," as required to justify prior restraint. The majority opinion cited, among other decisions, *Landmark Communications Inc. v. Virginia* (1978),[65] *Cox Broadcasting Corp. v. Cohn* (1975),[66] and *Oklahoma Publishing Co. v. District Court* (1977).[67]

In *Landmark*, the Supreme Court ruled 7 to 0 that a Virginia statute subjecting individuals, including newspapers, to criminal sanctions for disclosing information regarding proceedings before a state judicial review commission was a violation of the First Amendment. The case arose when the *Virginian Pilot* published an article accurately reporting details of an investigation of a state judge by the Virginia Judicial Inquiry and Review Commission. One month later, a state grand jury indicted the company that owned the newspaper for violating the statute by "unlawfully divulg[ing] the identification of a judge of a court not of record, and stating that the judge was the subject of an investigation and hearing" by the commission. In a bench trial, Landmark was fined $500 and ordered to pay court costs. The company appealed and the Supreme Court held that the First Amendment does not allow "the criminal punishment of third persons who are strangers to the inquiry, including news media, for divulging or publishing truthful information regarding confidential proceedings" of the Judicial Inquiry and Review Commission.[68]

The Court noted that the issue was narrow because the case was neither concerned with application of the statute to someone who obtained the information illegally and then divulged it nor with the authority to keep such a commission's proceedings confidential. But it was, nevertheless, an important victory for news gathering because it reinforced the principle that truthful information legally obtained enjoys First Amendment protection even when such information includes details of closed judicial proceedings. This protection is not absolute, of course, as the Court noted in both *Landmark* and *Smith,* but the state has a heavy burden in demonstrating that its interests outweigh those of the First Amendment. While admitting in *Landmark* that premature disclosure of the commission's proceedings could pose some risk of injury to the judge, judicial system, or operation of the commission itself, the Court said "much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[69]

In *Cox Broadcasting,* the U.S. Supreme Court declared unconstitutional a Georgia statute that made the press criminally and civilly liable for publishing the name of a rape victim even when such information was obtained from public records.[70] In *Oklahoma Publishing Co.,* the Court held that a state court injunction

barring the press from publishing the identity or photograph of an 11-year-old boy on trial in juvenile court was unconstitutional prior restraint.[71] The Court struck down the judge's order because he had already allowed reporters and other members of the public to attend a hearing in the case in which the information was disclosed. Once truthful information is "publicly revealed" or "in the public domain," it cannot be banned, according to the Court.

Globe Newspaper Co. v. Norfolk County Superior Court (1982): Unconstitutionality of Mandatory Closures

In 1982 the U.S. Supreme Court issued the first of three rulings that appeared to significantly broaden the holding in *Richmond Newspapers* (1980) that criminal trials were under the Constitution presumptively open to the press and the public. While the first decision, *Globe Newspaper Co. v. Norfolk County Superior Court* (1982),[72] did not deal directly with the scope of *Richmond Newspapers,* it still paved the way for the two subsequent cases that confronted this issue. In *Globe Newspaper*, the Court in a 6 to 3 opinion struck down as unconstitutional a Massachusetts statute that the state Supreme Judicial Court construed to require judges to exclude the press and the public in trials for certain sexual offenses involving a victim under the age of 18 during the time the victim is testifying. The key factor in the case was *mandatory closure*—the judge had no discretion. Liberally quoting its decision in *Richmond Newspapers,* the Court rejected the state's contentions that the statute was necessary to protect "minor victims of sex crimes from further trauma and embarrassment" and to encourage "such victims to come forward and testify in a truthful and credible manner." According to the majority opinion:

> Although the right of access to criminal trials is of a constitutional stature, it is not absolute. But the circumstances under which the press and the public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.[73]

The justices agreed that the first asserted state interest was compelling but that mandatory closure was not justified because "the circumstances of a particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."[74] The Supreme Court was not convinced at all on the second asserted interest because the press and the public are allowed to see the transcript and to talk with court personnel and other individuals and thus ascertain the substance of victims' testimony and even their identities. Thus the Court left the door open for closure on a case-by-case basis, while clearly prohibiting mandatory closure as unconstitutional prior restraint.

Press Enterprise I (1984) and *Press Enterprise II* (1986): Right of Access to *Voir Dire* and Preliminary Hearings

Press Enterprise I (1984)[75] and *Press Enterprise II* (1986),[76] as they have become known, opened up *voir dire* and preliminary hearings, at least as they are conducted in California, to the press and the public. *Press Enterprise I* is particularly significant because the Court for the first time held that the jury selection process is part of a criminal trial and thus presumptively open under the First and Fourteenth Amendments. The unanimous decision reiterated that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[77]

In *Press Enterprise I,* the newspaper was denied access to most of the *voir dire* in a trial for the rape and murder of a teenage girl. The judge allowed the press to attend the "general *voir dire*" but closed the courtroom when the attorneys questioned individual jurors. In all, only three days of the six weeks of *voir dire* were open, and the judge refused to allow a transcript of the process to be released to the public. The jury selection process could under some circumstances invoke a compelling government interest, but no such interest had been demonstrated in this case, according to the Court. An example cited by the justices of such a justified closure might be to protect an individual's privacy when a prospective juror had privately told the judge that she or a member of her family had been raped but had not prosecuted the offender because of the trauma and embarrassment from disclosure.

Two years later in *Press Enterprise II,* the Supreme Court held 7 to 2 that the press and the public enjoyed a limited First Amendment right of access in criminal cases to preliminary hearings. The holding was quite narrow because the Court emphasized that it applied only to such hearings "as they are conducted in California" where "because of its extensive scope, the preliminary hearing is often the most important in the criminal proceeding."[78] The case began when the newspaper was denied access to a 41-day preliminary hearing for a nurse charged with the murders of 12 patients. The defendant requested closure, and the magistrate in the case not only granted the motion but also sealed the record. The prosecution moved to have the transcript released and the trial court agreed to do so when the defendant waived the right to a jury trial, but the California Supreme Court reversed the trial court decision. The U.S. Supreme Court reversed, holding that "California preliminary hearings are sufficiently like a trial" to warrant a First Amendment right of access unless the state can demonstrate an overriding interest sufficient to overcome the presumption of openness.

Summary and Conclusions

Since *Press Enterprise II* the U.S. Supreme Court has not considered whether other portions of the criminal judicial process, including preliminary hearings in states that do not follow the California model, fall under the holding in *Richmond Newspapers*.

The composition of the Court has changed completely since 1986, except for Justice Stevens who voted with the majority in *Press Enterprise II*. Given the current composition of the Court with Justice John Roberts at the helm it does not appear likely that the Court will, even if given the opportunity, broaden the scope of the limited First Amendment right of access to the criminal judicial process.

The chances are even slimmer that the Court will recognize anytime soon a constitutional right of the press and the public to attend civil trials and related proceedings. Such a move would be a bold and unprecedented step toward truly opening the judicial system to the public, which it was designed to serve in the first place. Civil trials are now routinely open, with closures relatively unusual, in state and federal courts, but most federal and many state civil trials continue to be closed to electronic media coverage. The U.S. Supreme Court has always opened its formal proceedings, although not its deliberations, including oral arguments and the reading of decisions to the public, but the justices continue to ban cameras in the courtroom except for ceremonial occasions.

As the Court has indicated in each of its decisions dealing with access to the judicial process, the right of public and press access is not absolute, but the burden on the state to justify closure must necessarily be heavy. The trials of Bruno Hauptmann, Dr. Sam Sheppard, and even the O.J. Simpson murder trial were aberrations and should be viewed as such by the courts. Openness clearly promotes fairness and justice because it subjects the judicial system to press and public scrutiny, which is essential in an age in which the public appears to have lost some of its faith in the process.

Access to Places

No Special Right of Access to Public and Private Places by the Press

Although access to the judicial process has significantly expanded over the decades, press and public access to places, especially government institutions, has actually become more restricted, especially since the attacks of September 11, 2001. However, not all of the restrictions can be attributed to the aftermath of the attacks. As early as 1972 in *Branzburg v. Hayes*, the U.S. Supreme Court hinted at what might be in store for the future:

> Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial jury.[79]

Two years later the Court began drawing the boundaries with its decisions regarding access to prisons in *Pell v. Procunier* and *Saxbe v. the Washington Post*. The task of defining the specific limitations, though, was left to other courts and legislators but the Supreme Court certainly set the tone: so long as the media are granted the same privileges as the general public in gaining access to places, no First Amendment rights are violated.

Access to public property is generally much easier than private property, especially where a public forum exists, but there are times and circumstances when it is reasonable, according to the courts, to limit access even to public places and public events. Disasters and wars are prime examples in which authorities can severely restrict press and public access even though an event of great public interest may be involved.

During both the 1991 Persian Gulf War and the more recent wars in Afghanistan and Iraq, the U.S. military imposed restrictions on news media access. During the war in Iraq, journalists were embedded with United States troops and thus permitted to actually travel in fatigues or uniforms with soldiers on patrol and on maneuvers. Most press associations were pleased to have such access even when the military imposed embargoes on when and what they could report. However, as journalist Irwin Gratz, then President of the Society of Professional Journalists, told a group of colleagues in 2005, the federal government made less information about the Iraq War available to the public than it did about other battles before the September 11, 2001 attacks. According to Gratz, "The Bush administration has been working overtime to keep as much information secret as it can."[80]

During 2001 after the September 11 terrorist attacks, the United States military initiated combat operations in Afghanistan in its global war on terrorism. *Hustler* magazine publisher Larry Flynt asked the Department of Defense (DOD) to allow correspondents to accompany ground troops during combat. When Flynt was denied such access, he sued the DOD, claiming that his First Amendment rights had been violated. Flynt argued that the Constitution guaranteed journalists the right to travel with the military in combat. A U.S. District Court judge denied his claim and refused to grant an injunction against the DOD in enforcing such restrictions. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court decision in *Flynt v. Rumsfeld* (2004).[81] The appellate court held there was no such First Amendment right. This decision makes it clear that the military can determine if and when journalists can be embedded with troops in combat.

Execution is another area in which journalists have sometimes had difficulty gaining access in spite of the tradition at most executions that at least one member of the press be present during the proceeding. California, for example, unsuccessfully attempted to allow access to executions only after prisoners were taken to the chamber to be executed, tied down and had the intravenous lines started. However, that restriction was struck down as a violation of the First Amendment by the Ninth Circuit U.S. Court of Appeals in *California First Amendment Coalition v. Woodford* (2002).[82]

Typically, unless journalists can demonstrate either that (a) the government authorities acted unreasonably or in an arbitrary and capricious manner in blocking access or (b) the government discriminated against the press by blocking media access while allowing the public to enter the area, they will lose. Even when the public is given access, the media do not automatically have a right to full access by bringing cameras and other video and audio recording equipment. Journalists simply have the right to treatment equal to that granted to the public. Most police departments, especially in larger metropolitan areas, have written guidelines for dealing with the press at accidents and disasters. Although these are usually not legally binding because they are merely guidelines rather than administrative regulations, journalists, including news photographers, should be familiar with them. Often such guidelines are drawn up after consultation with the press. When they prove unworkable or unreasonable, the media should pressure police department administrators to change them. The changes are more likely to occur when the press makes a concerted and organized effort through professional associations such as area press clubs and the local chapters of the Society of Professional Journalists.

Restrictions on press intrusion on private property are usually rather severe, as was illustrated in 1979 when several reporters and photographers were arrested and later convicted of criminal trespassing after they entered a nuclear power plant construction site known as Black Fox Station in Rogers County, Oklahoma. The plant was owned by the Public Service Co. of Oklahoma (PSO), which had a record of denying access to the plant to the news media and the public. The arrests occurred after the reporters followed a group of antinuclear protestors as they crossed a border fence to enter the privately owned nuclear power plant site.

The Oklahoma District Court judge ruled that whereas "there is a First Amendment right of the news media to reasonable access to the news such as is available to the public generally," this right must be weighed against several opposing state interests.[83] (Although the power company was technically privately owned, the judge treated it as a governmental entity for purposes of the case because its operation was heavily regulated by the state and federal governments.) He then ruled that the reporters' First Amendment rights were not violated because the state had the duty to maintain public order and enforce criminal statutes and to protect property. The state Criminal Court of Appeals, in upholding the $25 fines imposed on each of the journalists by the trial court, held that the First Amendment does not guarantee the press access to property "simply because it is owned or controlled by the government."[84]

During the Vietnam War the press played a major role in reversing public opinion from strong support to doubts and opposition; the Persian Gulf War saw a return to "a patriotic press," the norm in wartime.[85] Media critic and columnist Richard Reeves, for example, suggested that the Cable News Network, which was the primary source for news about the war for most Americans according to opinion polls, should have been called PNN (Pentagon News Network).[86]

Wars inevitably invoke different rules for access for both the press and the public, but access can be restricted even when it means that significant news events will not be covered, both in peacetime and during war. The Iraq War revealed one of the

major ethical dilemmas facing journalists: *should the press agree to "voluntary" restrictions by the government in covering an important event when the restraint would otherwise likely be unconstitutional?*

It is imperative that the news media aggressively fight at all times for access to places and information on behalf of the public and the press when such access is essential to effectively gathering accurate data about events of public interest. However, voluntary restraint is justified under some circumstances, such as when national security would clearly be endangered. Nevertheless, the press must always be wary of agreeing to withhold information simply because the government has threatened to revoke a journalist's credentials or because the government has indicated it will deny access unless the news media exercise self-restraint. Sometimes the press may need to challenge the government even when public sentiment is strongly against journalists, as occurred during both the Gulf War and the war in Iraq.

One of the more controversial steps that some news organizations have taken is to work with governmental authorities, such as police and fire departments, to develop a system for issuing press passes. Such arrangements are becoming more common, but some journalists fear the result may be less rather than greater access. Presumably, under this argument, the guidelines established for the use of the passes offer authorities the chance to prevent the media from going where they want to go at crime and disaster scenes under the guise of a formal agreement that the press has promised to respect.

Access to Records

When it comes to gathering news, reporters and editors still rely most heavily on personal sources—experts, officials, politicians, eyewitnesses, ordinary individuals, lawyers, and so on—for information, but written as well as computerized records usually provide much of the material that goes into a typical news story. These records can include birth, marriage, and death certificates; divorce decrees; court documents; government agency materials; property deeds; and even telephone books and city directories. Although the focus of this section is on obtaining public documents, private individuals should not be overlooked as sources of records, especially of nonpublic materials. In fact, when you are writing a story, it sometimes may be more expeditious to consult a nongovernmental source for a copy of a legal document than to wait for days or months for a government agency to release the information. However, you should make sure in such a case that your source is absolutely trustworthy and reliable (and thus will not give you an altered document) and that the person did not illegally acquire the document (such as by stealing it from an office).

This chapter can provide only a summary of the process for legally obtaining public documents, but several useful guides may be consulted for further information.[87] Each of the 50 states has its own statutes regarding access to public government records, but two federal statutes deal specifically with U.S. government documents: the 1966 Freedom of Information Act (FOIA)[88] and the 1974 Privacy Act.[89]

1966 Freedom of Information Act

The FOIA celebrated its 40th anniversary in 2006. The Act, which President Lyndon Johnson reluctantly signed into law on July 4, 1966, generally mandates that all federal executive and independent regulatory agencies (a) publish in the *Federal Register* descriptions of their central and field organizations and the employees from whom and the process by which the public can obtain records from them; (b) make available for public inspection all final opinions and orders made in the adjudication of cases as well as statements of policy and interpretation adopted by the agencies, administrative manuals as well as current indexes providing identifying information to the public about any policy, decision, rule or regulation issued, adopted or promulgated by the agencies after July 4, 1967 (the effective date of the act).

Each agency is also required to publish at least quarterly and distribute copies of each index and to promulgate regulations regarding the schedule of fees for the processing of FOIA requests and the conditions under which fees will be reduced or waived. The upshot is that every agency must, on request, indicate the procedures and fees involved in obtaining records and make documents readily available.

There are some limitations to the Act. First, it applies only to federal agencies, not to state and local agencies, although all 50 states have similar statutes that make such records available at the state and local levels. Second, nine exemptions and three exclusions prevent many documents from being accessible. Third, the statute does not apply to the courts nor to Congress, which conveniently exempted itself from the law. Finally, the information is not free, although agencies cannot charge for the first two hours of search time nor for the first 100 pages of photocopies if the request is for noncommercial use. Even if fees are charged, a waiver or reduction can be granted when disclosure of the information would serve the public interest because it will likely contribute significantly to public understanding of the operations or activities of the government and the information requested would not primarily serve the requester's commercial interests.

Journalists routinely ask for this waiver because news stories based on such documents generally do increase public awareness about the activities of government and news gathering is one of the purposes Congress had in mind when the statute was written. Indeed, this is reflected by the fact that an agency can impose reasonable standard charges for document search, duplication, and review when the information is for commercial use, but it can charge educational or noncommercial scientific institutions and representatives of the news media only for duplication, not for search and review. The nine exemptions that permit an agency to withhold a record from the public are:

1. Matters specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and properly classified
2. Matters related solely to the internal personnel rules and practices of an agency
3. Matters exempted under another federal statute

4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential
5. Inter-agency or intra-agency memoranda or letters
6. Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy
7. Records or information compiled for law enforcement whose disclosure (a) could reasonably be expected to interfere with enforcement proceedings, (b) would deprive a person of the right to a fair trial, (c) could reasonably be expected to be an unwarranted invasion of privacy, (d) could reasonably be expected to identify a confidential source, (e) would include law enforcement techniques, procedures or guidelines for investigations or prosecutions, or (f) could reasonably be expected to endanger the life or physical safety of someone
8. Matters concerning the examination, operation, or condition of a financial institution
9. Geological and geophysical information and data, including maps, concerning wells[90]

An agency cannot refuse to provide a record simply because some of the information in it would fall under one or more of the exemptions. Instead the FOIA provides that any "reasonably segregable portion of a record shall be provided to any person requesting such record" after deletion of the portions which are exempt.[91] The exemptions also do not prevent an agency from releasing information even if it falls within one of the exemptions, depending upon the particular exemption and the circumstances.[92]

In 1996 Congress approved an amendment to the Freedom of Information Act known as the Electronic Freedom of Information Act.[93] The amendment requires agencies to "provide records in any . . . format requested . . . if the record is readily reproducible by that agency in that form or format" and requires them to "make reasonable efforts to search" for electronic records. Both records and indexes must be made available in electronic form for all records created after November 1, 1966. The traditional time limits for providing records can be extended under "exceptional circumstances" such as the need to review and process voluminous records requested by one person or organization. The period for the agency to determine whether to comply with a request was extended from 10 to 20 days by the amendment, but there is a provision that permits anyone with a "compelling need" to have expedited access to records. Examples of compelling needs are an "imminent threat to the life or physical safety" of a person and when a person primarily is involved in disseminating urgent information to the public about "actual or alleged Federal Government activity."[94] Some examples of stories that emerged from documents released under the FOIA include:

- Surveillance reports by the Department of Defense disclosing that the federal agency had monitored e-mail messages of students at four universities who were planning protests against the war in Iraq and

against the military's don't-ask-don't-tell policy for gay and lesbian members.[95]

- A series in the *St. Louis Post-Dispatch* entitled "Broken Promises, Broken Lives" about 21 deaths and 665 injuries among mentally ill and mentally disabled individuals in government-supervised institutions in Missouri over six years.[96]
- An investigative series in the *Los Angeles Times* about serious problems with the country's organ transplant system.[97]

State open records laws have also led to disclosure of information about major national events, including the 2006 release of recordings of hundreds of phone calls, most involving firefighters and dispatchers, from the September 11, 2001 New York World Trade Center attacks. The recordings were made public after the *New York Times* and relatives of victims of the attacks sued the city for their release.[98] A year earlier thousands of pages of emergency workers' oral histories and radio transmissions had been released. Five months earlier the city also released transcripts of 130 calls made by individuals trapped in the twin towers. Out of concern for potential invasion of privacy, some recordings were not made public, including those of 10 civilians calling from inside the towers.[99]

Several of the exemptions have been tested in court and thus deserve some discussion. A loophole in Exemption 1 became apparent in 1973 when the U.S. Supreme Court held that the exemption (as then worded, without a reference to "properly classified") did not permit a U.S. district court to conduct even an *in camera* inspection of records concerning an underground nuclear test, thus effectively granting the executive branch the sole discretion in determining what could be classified.[100] Congress rather quickly remedied that problem with a 1974 amendment that granted the courts the authority to conduct *in camera* inspections of documents whose disclosure is sought to determine whether they have been properly classified.[101] Unfortunately, much of the impact of the new law was buffered by the fact that Congress instructed the courts to grant considerable deference to agencies in making the determination on matters of national security, and the federal courts have followed the directions well. The provision also has few teeth because the President determines by executive order the particular classification system.

That system was followed by then President Ronald Reagan until 1995 and then continued by President George Bush. Under Executive Order 12,356,[102] the test for classification was simply whether disclosure could reasonably be expected to endanger national security, and the classification could continue for as long as its disclosure could harm national security—theoretically forever (although the executive order did permit agencies to establish predetermined declassification dates at their discretion). The executive order even permitted documents that had been declassified to be reclassified, *after* an FOIA request had been filed. In other words, an agency could classify a document that was not already classified *after* it was requested under the FOIA.[103]

On April 17, 1995, the picture changed fairly dramatically when President Bill Clinton issued Executive Order 12,958.[104] The order reflected President Clinton's "presumption of disclosure" philosophy that information should be classified when strongly justified. One of the most important parts of the order was that if "there is significant doubt about the need to classify the information, it shall not be classified."

Other significant developments in the history of the FOIA include (1) a new exemption added under the Homeland Security Act in November 2002 that permits federal, state, and local agencies to withhold information from the public about "critical infrastructure,"[105] (2) Executive Order 13,392 ("Improving Agency Disclosure") signed by President George W. Bush on December 14, 2005, requiring federal agencies to improve their processing of FOIA requests and become more "citizen-centered and results-oriented," including designating a chief FOIA officer.[106]

Department of Air Force v. Rose (1976): Exemption 2

Only one major U.S. Supreme Court decision has dealt directly with Exemption 2. In 1976 the Court ruled 5 to 3 in *Department of Air Force v. Rose*[107] that this exemption did not exempt from disclosure Air Force Academy case summaries, with identifying information excised, of honors and ethics code hearings because the purpose of the provision was to relieve federal agencies of the task of assembling and maintaining records that have no reasonable public interest value and thus are not applicable to matters of "genuine and significant public interest." The case arose when the *New York Law Review* was denied access to summaries of honors and ethics hearings even though the academy routinely posted this information and distributed it to faculty and administrators. The Air Force Academy also contended the records could be withheld under Exemption 6, but the Court rejected that argument as well, holding that "Exemption 6 does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy."[108] The majority opinion, written by Justice Brennan, noted that the case summaries revealed no names, and listed cadets "determined to be guilty." The summaries were widely disseminated within the academy.

Exemption 3

The purpose of Exemption 3 is to allow government agencies to withhold information even though it would otherwise have to be disclosed under the FOIA if a statute already permitted such withholding. The first big test of this exemption arrived in 1975 in *FAA v. Robertson*[109] in which the U.S. Supreme Court was asked to determine whether Congress intended for the disclosure requirements of the FOIA to apply to statutes that had allowed confidential information to be withheld before the Act took effect in 1966. The FOIA itself was not clear about this, and the Court accordingly ruled that such information fell under Exemption 3 and thus could be

kept secret. The case concerned a provision of the Federal Aviation Act that gave agency officials extremely broad authority to keep certain documents secret in the "interest of the public."

Congress immediately jumped into the fray and in 1976 passed an amendment to the FOIA that essentially overruled the Court's decision, although the amendment does allow the withholding of information under either one of two circumstances: (1) if the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue," or (2) the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[110] The courts have generally interpreted these provisions to mean that a statute must either explicitly refer to the FOIA regarding the information to be exempted or the information exempted must be of the type that the FOIA allows to be exempt.

In *Consumer Product Safety Commission v. GTE Sylvania* (1980),[111] the Court held that the Consumer Product Safety Commission (CPSC) was bound under the 1972 Consumer Product Safety Act rather than the FOIA in disclosing television-related accident reports. The commission released reports from television manufacturers to two consumer organizations, Consumers Union and the Public Citizen's Health Research Group, including reports provided by the companies to the commission at the commission's request. The companies claimed the reports were confidential. Under the 1972 Act, the agency was required to notify the manufacturers at least 30 days before the information was released so they would have an opportunity to respond in advance. In a unanimous opinion written by Justice Rehnquist, the Court ruled that the CPSC Act took priority over the FOIA and thus the commission should not have released the report without the 30 days' notice.

In another case, *CIA v. Sims* (1985),[112] the Court unanimously held that the names of 185 researchers at more than 80 universities who had received funding from the Central Intelligence Agency to study the effects on humans of mind-altering drugs did not have to be disclosed under the FOIA. Even though two people had reportedly died and others suffered mental problems as a result of the MKULTRA experiments—including use of the powerful LSD hallucinogen, which in some cases had been administered without the knowledge of the individuals—the Court ruled the National Security Act of 1947 took priority.

Under the Act, Congress granted the CIA director the authority to prevent unauthorized disclosure of intelligence sources. CIA files on the project were declassified in 1970, four years after the project ended.[113] The CIA made public all but 21 names of participating universities when a request was filed by the Public Citizen Health Research Group. The CIA claimed these 21 schools had been promised confidentiality. The Court, in line with the intent of Congress, gave considerable deference to the agency, noting that Congress had granted the CIA director "very broad authority to protect from disclosure all sources of intelligence information."[114]

It is clear from this decision that the U.S. Supreme Court strongly defers to agency heads in determining the kinds of information that can be withheld under

Exemption 3. Often that authority lies in the enabling statute that created the agency. This was illustrated two years after *CIA v. Sims* when the Court held in *Church of Scientology v. IRS* (1987)[115] that tax returns filed with the Internal Revenue Service met the criteria for the second category established by Congress in its 1976 FOIA amendment (the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld").

One year later, the Court dealt with the sticky issue of whether federal presentence reports had to be disclosed. In *U.S. Department of Justice v. Julian* (1988),[116] the Court held that the U.S. Parole Commission and Reorganization Act and Rule 32 of the Federal Rules of Criminal Procedure prevent only specific types of information to be withheld. These include the probation officer's sentencing recommendations, information from confidential sources, diagnostic opinions, and information that could cause personal harm. Anything else in a report has to be disclosed unless another exemption applies.

Exemption 4

The first test of Exemption 4 came in 1979 in *Chrysler Corp. v. Brown*,[117] in which the U.S. Supreme Court ruled in what is known as a "reverse FOIA suit" that the FOIA gave federal agencies the authority to release certain kinds of information that private corporations and individuals had submitted to the agency, including trade secrets and other types of confidential information. The case arose when the Defense Logistics Agency (DLA) received a FOIA request for information about Chrysler's affirmative action policies. Chrysler had been required under federal statutes to provide the information to the Department of Labor because the company had several contracts with the federal government. (The DLA is the equal opportunity employment compliance agency for the Department of Defense.) Before the DLA could release the information, which it had decided should be publicly disclosed, Chrysler successfully sought an injunction in U.S. District Court for the District of Delaware to bar release of the data. The Third Circuit U.S. Court of Appeals overturned the trial court order, and the U.S. Supreme Court upheld the lower appellate court ruling and remanded the case back to the district court. The Court unanimously held that the FOIA did not grant the company any private right of action to stop such disclosures even when they involve possible trade secrets. The Court gave the message that the FOIA is a disclosure statute and thus the exemptions *permit but do not require* federal agencies to withhold the release of documents that fall within one or more of the exemptions.

The impact of the *Chrysler* decision was buffered somewhat by a 1986 executive order issued by President Reagan,[118] which required agencies to notify companies when an FOIA request has been filed for information they have submitted. The order also allowed the corporation to comment on whether the data should be released and provides a 10-day period for the company to seek an injunction or other relief in court to stop the release if the agency decides to grant the FOIA request.

Exemption 5

Exemption 5 was designed to protect pre-decisional information, such as working drafts of documents, preliminary reports, tentative recommendations, and similar materials that are parts of the decision-making process. The idea is that agency personnel should be able to discuss matters under consideration without fear of disclosure before a final decision is made. Once a decision is final, of course, an agency is required to release the specific details, but administrators can engage in freewheeling, confidential exchanges while matters are under consideration. This exemption also includes agency–attorney communications as well as information obtained by the government in civil suits during the discovery phase when agencies are involved in the litigation.

The U.S. Supreme Court made it clear in *National Labor Relations Board v. Sears, Roebuck & Co.* (1975)[119] that Exemption 5 does not apply to "final opinions" that explain actions already taken by an agency and agency decisions that have already been made and thus are really "final dispositions." In other words, once a decision reaches the level of having some finality, it is no longer a privileged document under civil discovery, and an attorney on the other side or anyone else is entitled to see it. On the other hand, the Court also made it clear that attorney work products do fall under the exemption, and, therefore, memoranda prepared by a government attorney in anticipation of litigation do not have to be disclosed. Such memoranda would include litigation strategies indicating an attorney's approach to a case.

Four years later in *Federal Open Market Committee v. David R. Merrill* (1979),[120] the Court ruled that the Federal Reserve Board could, as permitted by law, delay the release of certain monetary policy directives during the time they are in effect, usually a month, after which they appear in the *Federal Register.* According to the Court, this information met the definition of intra-agency memoranda "not available by law to a party other than another agency in litigation with the agency."

Later, in *Federal Trade Commission v. Grolier, Inc.* (1983),[121] the U.S. Supreme Court ruled that the work products of government attorneys met the criteria of Exemption 5, regardless of the status of the litigation involved. The effect of the decision was to make the working documents of federal agency attorneys privileged until the government chose to make them public so long as such documents would traditionally be privileged under the Federal Rules of Civil Procedure.

The case involved an FOIA request filed by Grolier, an encyclopedia publisher, with the Federal Trade Commission (FTC) for documents compiled by FTC attorneys in a lawsuit against the company for deceptive sales practices. The suit was dismissed with prejudice (meaning the commission could not bring the same suit again against the publisher). According to its own testimony at trial, Grolier had sought the documents to determine how much the FTC had learned about its sales techniques through secret monitoring of door-to-door salespersons. The Court sided with the commission, however, contending that because it was silent about

the status of litigation, Exemption 5 included work product materials even when the litigation had presumably ended.

In *United States v. Weber Aircraft Corp.* (1984),[122] the U.S. Supreme Court ruled that confidential but unsworn information given during an investigation of the crash of an Air Force plane was protected from disclosure under Exemption 5. According to the Court, the statements "unquestionably" met the criteria for "intra-agency memorandums or letters" and were furthermore protected from civil discovery under a long-established principle known as the *Machin* privilege, under which confidential statements made to air crash safety investigators do not have to be revealed during pretrial discovery. The case involved a pilot who was injured in an Air Force plane crash and sought information provided to investigators in order to help him in his suit against the company that manufactured the plane.

Exemption 6: *U.S. Department of State v. Washington Post Co.* (1982)

Exemption 6 has spurred considerable controversy and litigation. The first U.S. Supreme Court case involving the exemption was handed down in a unanimous decision in 1982. It held that "similar files" included information about the citizenship status of foreign nationals. *U.S. Department of State v. Washington Post Co.*[123] concerned an FOIA request filed by the *Washington Post* with the U.S. Department of State to determine whether two Iranian nationals living in Iran had valid U.S. passports. The Supreme Court ruled in favor of the State Department denial, agreeing that disclosure could constitute "a clearly unwarranted invasion of the personal privacy" of the two men because disclosure could threaten their safety in Iran where intense anti-American feelings prevailed. The justices remanded the case back to the District of Columbia U.S. Court of Appeals for a final determination.

The Supreme Court rejected the newspaper's claim that the "similar files" term was not intended to include all files with personal information but instead those with intimate details and highly personal information. According to the Court, Congress intended for the exemption to include detailed government documents on a person that "can be identified as applying to that individual," thus granting a broad definition to "similar files."

A rather unusual case involving Exemption 6 developed in 1986 when the *New York Times* sought the tape recording of the astronauts' voice communications just prior to the tragic explosion of the space shuttle *Challenger* on January 28 of that year. All seven crew members died as the space shuttle self-destructed 73 seconds after lift-off. In *New York Times v. NASA*,[124] the District of Columbia U.S. Circuit Court of Appeals affirmed a U.S. District Court decision ordering NASA to release the tape. The appellate court applied a two-prong test in determining whether the recording fell under the exemption: "The threshold question is whether the material at issue is contained in a personnel, medical, or similar file. If it is, the court must then balance the individual and governmental interests involved in order to

determine whether disclosure would constitute a clearly unwarranted invasion of privacy" (citations omitted).[125]

The District Court ruled that the tape did not meet the threshold requirement and the Court of Appeals affirmed, concluding "that the information recorded on the tape is 'unrelated to any particular person' and therefore is not a similar file."[126] In 1990 the D.C. Circuit met *en banc* (with the full court participating rather than a panel of three) and reversed the earlier decision, holding that the tape was sufficiently similar to personnel and medical files so as to fall under Exemption 6. Upon remand, the District Court then ruled that releasing the tape would constitute a "clearly unwarranted" invasion of privacy and thus the tape was not made available.[127]

In 1991 the U.S. Supreme Court held that disclosure of unredacted reports of confidential interviews with Haitian nationals who had tried to illegally enter the United States would meet Exemption 6's requirement that they "would constitute a clearly unwarranted invasion of personal privacy." According to the Court in *United States Department of State v. Ray* (1991),[128] the individual's right of privacy had to be balanced against the public right to know under the FOIA. The Court recognized the legitimate public interest in knowing whether the government was doing an adequate job in monitoring Haiti's compliance with an agreement it had made with the United States to not prosecute illegal aliens when they were sent back to Haiti. The Court said, however, that the redacted interview summaries the Department of State had made available were sufficient to satisfy the public interest, noting that the unredacted summaries would make it easy to identify the people interviewed and possibly make them and their families vulnerable to embarrassment and retaliation.

The records had been requested by a Florida attorney representing Haitians seeking political asylum in this country and three of his clients. The summaries turned over to him by the government ran about 96 pages.

In *United States Department of Defense v. Federal Labor Relations Authority* (1994),[129] a unanimous court ruled that the Privacy Act of 1974 forbids the disclosure of employee addresses to collective bargaining representatives who request access under the Federal Service Labor–Management Relations Statute. The opinion was written by Justice Thomas, with Justice Souter filing a concurring opinion and Justice Ginsburg filing an opinion concurring in the judgment. Two labor unions had filed unfair labor practice charges with the FLRA after the federal government gave them names and work stations but refused to turn over home addresses of agency employees represented by the unions. The labor statute requires federal agencies "to the extent not prohibited by law" to provide unions with information necessary for collective bargaining. The agencies contended revealing home addresses was a violation of the Privacy Act. The FLRA ruled in favor of the unions, rejecting the government agencies' argument.

On appeal, the Fifth Circuit U.S. Court of Appeals ruled in favor of the FLRA and the unions. The divided panel said the Privacy Act does not forbid disclosure of personal information if such disclosure was required under the FOIA. The court

said that only Exemption 6 of the FOIA potentially applied in the situation but that since the FOIA applies only secondarily to the labor statute, "it is proper for the federal court to consider the public interest embroiled in the statute which generates the disclosure request."[130]

Applying this standard, the appeals court held that the public interest purpose of the labor statute would mean there was no "clearly unwarranted invasion of privacy" under Exemption 6. In other words, the court was ruling that because Exemption 6 did not apply, the FOIA's broad mandate for disclosure would require disclosure of the addresses and, in turn, the Privacy Act would give FLRA the authority to order disclosure.

The U.S. Supreme Court disagreed, holding that the FOIA no longer required disclosure, as the Supreme Court had indicated in another case discussed in this chapter, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* (1989), which focuses on Exemption 7. The test, as discussed below, in determining whether this case was an unwarranted invasion of privacy involved balancing the public interest in disclosure against the public interest Congress intended to serve in passing the legislation:

> . . . the only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which the disclosure would serve the 'core purpose of the FOIA,' which is 'contribut(ing) significantly to public understanding of the operations or activities of the government' [citing *DOJ v. Reporters Committee*].[131]

Under this test, the Court said, the purpose for which the information is sought does not determine whether there is an unwarranted invasion of privacy. The Court went on to note, "The relevant public interest supporting disclosure is negligible, at best," whereas "it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant." Thus the Court held:

> Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that the disclosure would constitute a 'clearly unwarranted invasion of personal privacy.'[132]

This ruling clearly broadens the sweep of *Department of Justice v. Reporters Committee for Freedom of the Press,* but, as Justice Souter said in his brief concurring opinion, "[I]t does not ultimately resolve the relationship between the Labor Statute and all of the Privacy Act exemptions potentially available to respondents. . . ."

In *Dobronski v. the Federal Communications Commission* (1994),[133] the Ninth Circuit U.S. Court of Appeals ruled the sick leave records of a Federal Communications Commission official must be disclosed under the FOIA. The Court said anyone, including a private citizen, has the right to find out whether public officials have abused their offices. The records involved allegations that an employee had taken unauthorized paid vacation time. The three-judge panel said the public interest in revealing corruption outweighs any minimal privacy interest the official may have in keeping the records closed.

In the aftermath of four hurricanes in Florida in 2004, the South Florida *Sun-Sentinel* newspaper asked the Federal Emergency Management Agency (FEMA) for the names and addresses of disaster claimants, the names and identification numbers of FEMA inspectors, and various e-mail messages. FEMA denied the request, citing Exemption 4 and Exemption 6 under the FOIA as well as the Privacy Act. On appeal of the FEMA denial, the U.S. District Court for the Southern District of Florida ruled in *Sun-Sentinel v. U.S. Department of Homeland Security* (2006)[134] that Exemption 6 did apply to release of the names. However, the court held that the exemption did not apply to release of the home addresses and neither exemption applied to the names and identification numbers of the FEMA inspectors. Thus this information was required to be released, according to the court, which also ordered the release of all but two e-mail messages of FEMA officials. The two exempt messages included legal advice from FEMA's general counsel, which the court said fell within the scope of attorney–client privilege.

Exemption 7: *Department of Justice v. Reporters Committee for Freedom of the Press* (1989)

A great deal of litigation has focused on Exemption 7. It is clear in Exemption 7 that the FOIA generally does not apply to records or information compiled for law enforcement purposes. However, such information is unavailable only to the extent that release of the information would meet one or more of the six standards listed in the exemption, for example, a disclosure that would interfere with judicial proceedings, disclose a confidential source, or endanger the life or physical safety of a person. One of the most important U.S. Supreme Court decisions involving the exemption occurred in 1989 in *Department of Justice v. Reporters Committee for Freedom of the Press*[135] in which the Court unanimously ruled that reporters have no right under the FOIA to obtain computerized FBI criminal identification records, commonly known as rap sheets.

The Reporters Committee and CBS reporter Robert Schakne sought the FBI rap sheet on Charles Medico, whose company had allegedly won defense contracts with the U.S. government with the assistance of a member of the House of Representatives to whom the company had made substantial campaign contributions. The Justice Department refused to release the information on the ground that the disclosure "could reasonably be expected to be an unwarranted invasion of personal privacy," although it did release the records of Medico's three brothers who were also allegedly involved in the scheme after they died. The committee argued that much of the information in the rap sheets had already been made public anyway in state and local police and court records, but the Court disagreed: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[136]

The Court also noted that the FBI maintains rap sheets on more than 24 million individuals and keeps the information on file until a person dies or attains age 80. The central purpose, according to the opinion written by Justice Stevens, "is to ensure that the government's activities be open to the sharp eye of public scrutiny, not that the information about private citizens that happens to be in the warehouse of government be so disclosed."[137]

In an earlier decision, the Court upheld the National Labor Relations Board's refusal to disclose potential witnesses' statements collected during a federal investigation of the labor practices of a tire company.[138] The majority opinion said that the information met the criteria of "investigatory records compiled for law enforcement purposes" that could reasonably be expected to interfere with enforcement proceedings.

In 1982 the Court ruled 5 to 4 in *FBI v. Abramson*[139] that Exemption 7 was broad enough to include information originally compiled in the form of law enforcement records that had been summarized as a new document not created for law enforcement. Howard Abramson, a freelance writer, was denied his FOIA request for a memo written by former FBI Director J. Edgar Hoover to Watergate conspirator John Erlichmann. Abramson was also denied access to some 63 pages of "name check" summaries on various political targets of President Nixon's administration. According to the Court, once an agency has determined the information was compiled for a legitimate law enforcement purpose and that disclosure would cause one of the six types of harm, the information continued to be exempt even if recreated in a new form.

Following the reported suicide of President Bill Clinton's Deputy Counsel Vincent Foster, Jr. in 1993, five government investigations were conducted, including one by Independent Counsel Kenneth Starr. Because Foster's body was found in Fort Marcy Park on federal property, the United States Park Police conducted the initial investigation into his death, including taking 10 color photos of his body at the death scene. The investigation concluded that Foster had shot himself with a revolver. Other investigations reached similar conclusions.

Alan Favish, an associate counsel for an organization known as Accuracy in Media (AIM), sued on behalf of AIM for release of the death scene photos by the U.S. Office of Independent Counsel (OIC). After the U.S. District Court for the District of Columbia ruled against the release, Favish then requested as a private citizen the release of the 10 body photos and another photo showing Foster's eyeglasses. After the OIC denied the request and the district court affirmed, the Ninth Circuit U.S. Court of Appeals remanded the case back to District Court, which then ordered the release of five of the photos. The government appealed this decision to the Ninth Circuit again, which affirmed the release of four of the photos.

In *National Archives and Records Administration v. Favish* (2004),[140] the U.S. Supreme Court held for the first time that the surviving family members of a deceased individual whose records were sought through an FOIA request had privacy interests under the Act. The decision authored by Justice Kennedy unanimously reversed the lower appellate court decision. The Court ruled that the "FOIA recognizes

surviving family members' rights to personal privacy with respect to their close relative's death-scene images" and that in this case the "family's privacy interest outweigh[ed] the public interest in disclosure." The Court went on to note:

> As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information. However, when Exemption 7(C)'s privacy concerns are present, the requestor must show that public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and that the information is likely to advance that interest.[141]

The U.S. Supreme Court seemed particularly persuaded in its decision by a sworn declaration of Foster's sister filed in the District Court, stating that the family had been inundated with requests from what she called "political and commercial opportunists" who planned to profit from her brother's suicide. Shelia Foster Anthony described how she had been "horrified and devastated" by one photo that had already been leaked to the press. She said, "Every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life." [142]

Exemptions 8 and 9

The last two exemptions have stimulated little litigation, primarily because the courts have given agencies broad leeway in withholding information under them. The U.S. Supreme Court has not dealt directly with either exemption.

There are also three exclusions under the FOIA. As the Federal Citizen Information Center (FCIC) of the U.S. General Services Administration (GSA) notes in its online guide to accessing federal records, "The three exclusions, which are rarely used, pertain to especially sensitive law enforcement and national security matters."[143] Exclusions work differently from exemptions. They permit federal law enforcement agencies to "treat the records as not subject to the requirements" of the FOIA. In other words, when these records are involved, the agency holding the record can simply respond that no record responsive to the FOIA request exists.[144] Thus the agency does not even have to indicate that a record exists.

Federal Freedom of Information Act Today

The Federal Freedom of Information Act, which was strengthened by the Freedom of Information Reform Act of 1986 and broadened by the Electronic Freedom of Information Act in 1996 to include electronic records, has generally granted much greater access of the press and the public to federal records. Unfortunately, the courts and the executive branch continue to place barriers to such access. Occasionally, Congress knocks down the obstacles with mending legislation, but progress has been relatively slow.

According to the 2006 annual report by OpenTheGovernment.org, there has been "a continued expansion of government secrecy across a broad array of agencies and actions."[145] Some of the statistics cited in the report include:

- There was a slight decline in the number of documents classified in 2005 (14.2 million) than in the previous year (15.6 million), but the rate was still almost double the number in 2001, the year of the September 11 terrorist attacks.
- For each dollar spent declassifying old documents, the federal government spent $134 to create and store new secret documents in 2005.
- State legislatures in 2005 enacted twice as many new laws restricting access as they passed to increase access to public records.
- More than 2,000 secret surveillance orders were approved by the Foreign Intelligence Surveillance Court in 2005, more than double the number five years earlier. The court has turned down only four federal government requests for surveillance orders since it was established in 1980.[146]

The report concluded that some protections are necessary for unclassified information, such as personal privacy information or trade secrets. The federal government, however, has greatly expanded its ability to control unclassified public information through vague restrictions that give government officials wide latitude to declare information beyond the public's reach. Such unchecked secrecy threatens accountability in government and promotes conflicts of interest by allowing those with an interest in disclosure or concealment to decide between openness or secrecy.[147]

Improper classification has apparently become a serious problem. According to an official audit by the National Archives, 36 percent of more than 25,000 records removed were improperly reclassified under classification standards set up under a 1995 executive order.[148] To combat this problem, the Archive's Information Security Oversight Office issued new reclassification guidelines in 2006, by which all of the agencies agreed to abide. *Parade* magazine cited examples of information that had been classified that most people would agree did not warrant classification including:

- Names of illegal aliens convicted in this country of violent crimes such as murder and rape
- Notes of inspectors from the Mine Safety and Health Administration that are no longer classified
- Daily CIA intelligence briefings prepared for President Lyndon Johnson in the 1960s
- Except for 1963, 1997 and 1998 (which have been declassified), the annual budget for American intelligence, including the CIA[149]

Americans apparently share the same skepticism as journalists when it comes to government secrecy, according to a 2006 Scripps Howard News Service poll. Of the more than 1,000 U.S. citizens surveyed, nearly one in six believed the federal government has "too much secrecy." When asked whether "public access to government records is critical to the functioning of good government," 62 percent said such access was critical. About half of the respondents said FOI laws offered the public about the right amount of access, and more than a quarter said the laws did not provide enough access.[150]

Although the FOIA requires federal agencies to respond to requests within 20 working days of receipt (not counting Saturdays, Sundays, and federal holidays), in practice the wait is often much longer—sometimes years. According to a National Security Archive (NSA) audit, the oldest unfilled FOIA request belongs to William Aceves, a professor at California Western School of Law who filed four requests in 1989 while he was a graduate student at the University of Southern California.[151] Aceves was seeking information about the federal government's Freedom of Navigation Program. The government has provided some of the information, including blank, redacted pages but not everything he requested. The 2006 NSA audit included a list of the top 10 oldest unfilled requests, including two requests for information about the Berlin Crisis in 1958 in which the Soviet Union (as it was known at that time) gave the United States, Britain, and France six months to withdraw from West Berlin.[152]

Some changes have been instituted to attempt to speed up the process, including an executive order issued by President George W. Bush in 2005 that requires each federal agency affected by the FOIA to have at least one "FOIA Requester Service Center" that can be contacted to find out the status of a pending request. Each agency also has a "FOIA Public Liaison" who can be contacted when there is a complaint about service by one of the centers. Under some circumstances, an agency, if requested, can conduct "expedited processing" of a request. A study of 13 Cabinet departments and 9 agencies by the Coalition of Journalists for Open Government found that the number of unprocessed requests increased from 104,225 in 2004 to 148,603 in 2005, with unprocessed requests rising from 20 to 31 percent of the total. The report also found a decline in the number of federal employees handling FOIA requests over the years.[153]

Even with the FOIA policy changes enacted by President George W. Bush, many journalists and First Amendment scholars were highly critical of the administrations' overall record in enforcing the statute. According to First Amendment scholar Jane Kirtley, the "administration's contempt for the public right to know amounts to an organized assault on freedom of information that is unprecedented since the enactment of the Freedom of Information Act forty years ago."[154]

The strongest damage to the FOIA's attempt to broaden public access to government records may have been inflicted by the three U.S. Supreme Court privacy-related decisions. As First Amendment scholars Martin Halstuk and Bill Chamberlin note in their analysis of the FOIA and privacy protection, "In the aggregate, the *Washington Post*, *Reporters Committee* and *Favish* opinions have resulted in an FOIA framework that has significantly diminished the FOIA-related public interest while expanding the statute's privacy protections. The framework has no basis in either the plain text or legislative history of the statute. . . ."[155]

Halstuk and Chamberlin ultimately conclude that the "Court's current FOIA policy privacy framework is the product of judicial overreaching grounded in historical revisionism that is clearly at odds with the bedrock democratic principles of accountability and transparent governance in an open society, as envisioned by FOIA's framers 40 years ago."[156]

Although not part of the FOIA, a provision in the Department of Homeland Security Appropriations Act of 2007 that funded the department requires federal agencies that handle unclassified information that is kept out of the public eye for security reasons (called "sensitive security information" or SSI) must review the information after three years to determine whether withholding the information is justified. The government agency must follow specific procedures in conducting the review.

Privacy Act of 1974

During the final week of its 94th Session, the U.S. Congress hastily passed the Privacy Act of 1974,[157] whose primary purposes were to set limits on personal information gathered about citizens by the federal government and to guarantee individuals, except under certain conditions, the right to see records collected about them and to have corrections made in those records that are inaccurate or incomplete.

The Act, as with the FOIA, applies only to documents held by agencies in the executive branch of the U.S. government. It does not apply to state and local governments. Only the individual who is the subject of the records or that person's authorized agent has the right of access. The Act includes 10 exemptions: (1) information compiled in reasonable anticipation of a civil action or proceeding, (2) Central Intelligence Agency records, (3) law enforcement records, (4) national security information covered under the FOIA, (5) materials compiled for law enforcement purposes and criminal investigations, (6) Secret Service records, (7) statistical records, (8) confidential information provided in connection with civilian employment, military service, federal contracts, etc., (9) testing and examination materials used to determine individual qualifications for federal employment, and (10) confidential information given in connection with the potential promotion of an individual in the armed services.[158] The Act applies only to records that are kept as part of a "system" of records and does *not* apply to Congress or the courts. As with the FOIA, there is no central government office where one can ask for records. Instead, a person has to go to each agency to make a request. As with the FOIA, requests have to be filed with the specific agency holding the record. There is no central federal office for processing requests or time limit for agencies to fulfill requests, although most agencies have adopted the same time limits as those under the FOIA. If an individual finds inaccurate information in a file, that person has the right, with proper documentation, to have the record corrected. Denials can be appealed, and even if the denial stands, a person has a right to submit a statement of explanation that the agency is required to attach to any nonexempt records.[159]

The Act provides both criminal and civil penalties. A government employee who knowingly discloses information without authority to do so under the Act can be

found guilty of a misdemeanor and fined not more than $5,000.[160] Similar penalties are provided for a person who requests information under false pretenses.[161]

Driver's Privacy Protection Act of 1994

In 1994 Congress passed the Driver's Privacy Protection Act,[162] after 21-year-old actress Rebecca Schaeffer was murdered by a deranged fan in July 1989. Robert John Bardo was convicted of murder for shooting the star of the "My Sister Sam" television show in the doorway of her Los Angeles apartment.[163] He had obtained her address by requesting her driver's records.

Under the Act, which took effect in 1997, severe restrictions were imposed on the release by the states of personal information from motor vehicle records, driver's licenses, and auto registrations. The information included a person's photograph, social security number, driver identification number, name, address, medical conditions or disabilities, and phone number. Excluded from the Act was information about auto accidents, driving violations, and the driver's status. Civil penalties of up to $5,000 per day can be levied against any department of motor vehicles that fails to comply with the Act. States were allowed to enact "opt-out" laws or adopt policies that give motorists the opportunity to decide whether to keep the information confidential, and 29 states chose to do so before the law took effect.[164]

Journalists generally oppose such statutes, citing instances in which such information had served the public good, including stories exposing pilots and school bus drivers who had been convicted of drunken driving and other serious violations and yet remained on the job.[165] Various press associations lobbied to overturn the statute, and in 1997 South Carolina Attorney General Charlie Condon, joined by the Newspaper Association of America, the American Society of Newspaper Editors, and five state press associations, succeeded in getting the law declared unconstitutional, at least in South Carolina.

U.S. District Court Judge Dennis Shepp ruled in *Condon v. Reno* (1977)[166] that the Act violated the Tenth Amendment's Commerce Clause (which provides that the powers not delegated to the federal government "are reserved to the States"). Judge Shepp relied heavily upon the U.S. Supreme Court decision in *Printz v. United States* (1997),[167] which declared unconstitutional a provision of the so-called "Brady" bill that required local law enforcement officials to perform background checks on anyone applying for a handgun license. The district court decision prevents enforcement of the law only in South Carolina. The strategy of journalism associations has been to challenge the statute on Tenth Amendment, rather than First Amendment, grounds because the courts are unlikely to recognize any First Amendment right of access to such records.

Access to Meetings

Access to meetings of federal, state, and local governmental agencies is no longer a major problem for the mass media. Since Congress passed the "Government in the Sunshine Act,"[168] which took effect on March 12, 1977, the meetings of all

major federal agencies (such as the Federal Trade Commission and the Federal Communications Commission) have been open to the press and to the public. The exceptions are parallel to those of the FOIA, with two additions: (a) agencies responsible for regulating financial institutions, currencies, securities, and commodities can close meetings that could lead to "significant financial speculation" or "significantly endanger the stability of a financial institution" and (b) meetings involving certain litigation matters such as issuing a subpoena or initiating a civil action. There have been few legal challenges to those meetings that have been closed, although some agencies are much more likely than others to broadly apply the exemptions. All 50 states and the District of Columbia have similar open meetings statutes, with some states offering greater access by having fewer exemptions and opening up more agencies.

Summary and Conclusions

The Freedom of Information Act of 1966 and the Government in the Sunshine Act of 1977 have provided the news media and the public with much broader access to federal government agency records and meetings. Both Acts, but particularly the FOIA, have had to be amended over the years to cope with adverse court rulings and changing technologies. One of the most significant changes to the FOIA was the Electronic Freedom of Information Act of 1996, which granted greater access to electronic records and required agencies to make records readily available in electronic form. The Privacy Act of 1974 provides access for individuals to federal records collected and maintained about them and sets limits on the types of information the federal government can seek and keep about private citizens. Each of the statutes, of course, has exceptions, and much of the litigation surrounding them has involved these "exemptions."

All states have statutes similar to the FOIA and the Government in the Sunshine Act, although the extent of access varies from state to state. In general, state and local governments have been more restrictive than the federal government in providing access, although the situation may be changing toward more openness. When the U.S. Congress passed the Driver's Privacy Protection Act of 1994, a state government—South Carolina—led the way, accompanied by press associations, in challenging the Act, which severely restricted public and media access to state motor vehicle records.

A 2005 executive order known as "Improving Agency Disclosure of Information" reaffirmed that the FOIA "has provided an important means through which the public can obtain information regarding the activities of federal agencies" and required federal agencies to make their FOIA efforts "citizen-centered and results-oriented.[169] In spite of these good intentions, the fact remains that the trends are toward greater restrictions by federal, state, and local government agencies on access to information and to meetings. The OpenTheGovernment.org report discussed above clearly pointed to such trends. The September 11, 2001 attacks on America and the resulting legislative and judicial reaction, including the USA Patriot Act, have particularly made it easier to classify documents even when there is little justification.

A good illustration of this trend is the experience of the Sunshine Project, a group that opposes the proliferation of biological weapons. In 2006 the organization filed an FOIA request with East Carolina University, seeking documents the institution held on how it oversaw research on biological weapons.[170] The university denied access to many of the records on national security grounds. By accident, the university included both the redacted documents as well as a series of e-mail messages it had apparently intended to withhold. In comparing the original documents with the redacted ones, Sunshine Project discovered what had been deleted. The redacted information included (a) a discussion among officials on whether they should withhold information about herpes research, (b) minutes of a university committee focusing on a defective waste incinerator, and (c) the phrase, "no gas in lab."[171]

To some extent, there exists somewhat of a contrast between the approach of the federal government and those of state governments. For example, the trend in state courts is to allow cameras in courtrooms, but the general ban on cameras in the federal courts continues. This is in spite of the fact that an experimental project in the federal courts demonstrated clearly that there were no substantial adverse effects from the use of still and video cameras in the courtroom.

How does the public fit into the picture? According to most opinion polls, Americans remain ambivalent about access, especially to records. This ambivalence undoubtedly reflects intensifying public concern over what it sees as a serious erosion of individual privacy. On the other hand, we continue to expect the news media to serve the watchdog role, especially with the declining confidence in the government, including elected and appointed officials.

The general trend has been for more federal agencies to release records thanks to President Bill Clinton's executive order in 1995 that began automatic declassification of records more than 25 years old, unless an agency specifically requests an exemption. The order was to take effect in 2000, but was later extended to 2003 and then given another three-year reprieve by President George W. Bush, who refused, however, to grant further extensions. As a result, hundreds of millions of pages have been released (with much of it now available online) by the CIA, FBI, National Security Agency and other agencies.[172]

Endnotes

1. Comment to reporters at a press conference in 1994 when she was asked repeatedly about her marriage to Lyle Lovett.
2. Dan Paul, Richard J. Ovelmen, and Enrique D. Arana, *Access*, in 1 Communications Law 91 (2005).
3. *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). The Court, in affirming the constitutionality of a federal law making bigamy a crime in the territories, rejected a motion for a new trial on the ground that the trial judge had allowed an individual to serve on the jury who, it was asserted, "'believed' he had formed an opinion which he had never expressed, and which he did not think would influence his verdict on hearing the testimony."
4. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973, 6 Med. L.Rptr. 1833 (1980).
5. *Paul M. Branzburg v. John P. Hayes*, *In the Matter of Paul Pappas*, and *U.S. v. Earl Caldwell*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, 1 Med.L.Rptr. 2617 (1972).

6. *Gannett Co., Inc. v. Daniel A. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, 5 Med.L.Rptr. 1337 (1979).
7. *Thomas L. Houchins, Sheriff of the County of Alameda, Calif., v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553, 3 Med.L.Rptr. 2521 (1978).
8. *Gannett v. DePasquale.*
9. *Id.*
10. *Richmond Newspapers, Inc. v. Virginia* (Brennan concurrence).
11. Dan Paul, Richard J. Ovelmen, and Enrique D. Arana.
12. *J. M. Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, 1 Med.L.Rptr. 1001 (1931).
13. *Nebraska Press Association v. Judge Hugh Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 1 Med.L.Rptr. 1059 (1976).
14. *Id.*
15. Minow and Cates, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 Am. U. L. Rev. 631 (1991).
16. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589, 1 Med.L.Rptr. 1232 (1975).
17. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, 1 Med.L.Rptr. 1178 (1961).
18. *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, 1 Med.L.Rptr. (1963).
19. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d, 1 Med.L.Rptr. 1187 (1965).
20. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, 1 Med.L.Rptr. 1220 (1966).
21. *Murphy v. Florida.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Irvin v. Dowd.*
26. *Rideau v. Louisiana.*
27. For background on Wilbert Rideau and his trials, see the "Wilbert Rideau" entry for Wikipedia at http://en.wikipedia.org/wiki/Wilbert_Rideau.
28. While the judge banned live broadcasting during most of the trial, the opening statements and closing arguments of the prosecutor, the return of the jury's verdict, and the receipt of the verdict by the judge were broadcast live. Other portions of the trial were recorded by a camera behind a camouflaged booth and broadcast later as clips during the local newscasts. News photographers were also restricted to the booth area.
29. *Estes v. Texas.*
30. *Noel Chandler and Robert Granger v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 7 Med.L.Rptr. 1041 (1981).
31. Beth Chesterman, *Restrictions on Courtroom News Coverage*, First Amendment Center at Vanderbilt University (Aug. 16, 2006), available at http://www.firstamendmentcenter.org; Radio–Television News Directors Association and Foundation, Freedom of Information, *Cameras in the Court: A State-by-State Guide*, available at: http://www.rtndf.org/foi/scc.shtml.
32. Chesterman, *Restrictions on Courtroom News Coverage, supra,* note 31.
33. Radio–Television News Directors Association and Foundation, Freedom of Information, *Cameras in the Court: A State-by-State Guide, supra,* note 31.
34. *Courtroom Television Network v. State of New York*, 5 N.Y.3d 222, 833 N.E.2d 1197, 33 Med.L.Rptr. 1887 (2005).
35. *Id.*
36. *Illinois High Court Rejects Bid to Allow Cameras in Courtrooms* (Associated Press), First Amendment Center at Vanderbilt University (Sept. 15, 2005), available at http://www.firstamendmentcenter.org.

37. *Cameras in the Courtroom*, Cong. Q, Testimony by Henry Schleiff to U.S. Senate Judiciary Committee, Nov. 9, 2005.
38. *Id.*
39. *Would Cameras Change the Court?,* News Media & Law, Spring 2006, at 22.
40. *Id.*
41. *Richmond Newspapers, Inc. v. Virginia.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Sheppard v. Maxwell.*
46. The old network TV series, "The Fugitive" was loosely based on the Sheppard story, as was the 1993 movie by the same name in which Dr. Richard Kimble is hunted down by ruthless U.S. Marshall Sam Gerard.
47. *Sheppard v. Maxwell.*
48. *Id.*
49. *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).
50. *William B. Saxbe v. the Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974).
51. *Pell v. Procunier.*
52. *William B. Saxbe v. the Washington Post Co.*
53. *Branzburg v. Hayes.*
54. *Thomas L. Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553, 3 Med.L.Rptr. 2521 (1977).
55. *Id.*
56. J. Lafayette, *Chasing the Juice: O.J. Saga Throws Media Into Overdrive,* Electronic Media, June 27, 1994, at 1.
57. B. J. Palermo, *A Rush to Reform: Critics Fear Some Simpson-Inspired Changes Are Misguided*, 83 A.B.A. J. 20 (Apr. 1997).
58. Tony Mauro, *Simpson Trial Aftermath: Courts Closing Doors,* First Amendment News, Mar. 1996, at 1.
59 N. Lee Cooper, *Don't Get Trampled by Media Circus*, 83 A.B.A. J. 8 (Feb. 1997).
60 *Public Fed Up with Coverage But Can't Resist*, Lexington (Ky.) Herald-Leader (Washington Post), Feb. 13, 1998, at A11.
61. *Richard Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570, 3 Med.L.Rptr. 2074 (1978).
62. *Robert K. Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399, 5 Med.L.Rptr. 1305 (1979).
63. *Id.*
64. *Id.*
65. *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1, 3 Med.L.Rptr. 2153 (1978).
66. *Cox Broadcasting Corp. et al. v. Martin Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, 1 Med.L.Rptr. 1819 (1975).
67. *Oklahoma Publishing Co. v. District Court in and for Oklahoma County*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355, 2 Med.L.Rptr. 1456 (1977).
68. *Landmark Communications v. Virginia.*
69. *Id.*
70. *Cox Broadcasting v. Cohn.*
71. *Oklahoma Publishing v. District Court.*
72. *Globe Newspaper Co. v. Norfolk County Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248, 8 Med.L.Rptr. 1689 (1982).

73. *Id.*
74. *Id.*
75. *Press Enterprise Co. v. Riverside County Superior Court* (*Press Enterprise I*), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629, 10 Med.L.Rptr. 1161 (1984).
76. *Press Enterprise Co. v. Riverside County Superior Court* (*Press Enterprise II*), 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1, 13 Med.L.Rptr. 1001 (1986).
77. *Press Enterprise I.*
78. *Press Enterprise II.*
79. *Branzburg v. Hayes.*
80. John Huotari, *SPJ Chief: Media Must Probe; Journalists Should Challenge Restrictions on Information*, Knoxville News-Sentinel, May 21, 2005, at B2.
81. *Flynt v. Rumsfeld*, 355 F.3d 697, 32 Med.L.Rptr. 1289 (D.C. Cir. 2004).
82. *California First Amendment Center Coalition et al. v. Woodford et al.*, 299 F.3d 868, 30 Med. L.Rptr. 2345 (9th Cir. 2002).
83. *State of Oklahoma v. Benjamin Bernstein et al.*, 5 Med.L.Rptr. 2313, *aff'd*, *Stahl v. Oklahoma*, 665 P.2d 839, 9 Med.L.Rptr. 1945 (Okl. Crim. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 973, 79 L.Ed.2d 212 (1984).
84. *Stahl v. Oklahoma.*
85. K. Seelye and D. Polman, *Military Reined in Media, Held Tight*, Lexington (Ky.) Herald-Leader (Knight Ridder News Service), Mar. 28, 1991, at D14.
86. *Id.*
87. Three good official sources for more information are: (1) *Your Right to Federal Records*, U.S. General Services Administration and U.S. Department of Justice (joint publication usually updated annually and available at http://www.pueblo.gsa.gov/cic), (2) *DOJ FOIA Guide*, U.S. Department of Justice (updated every two years and available at http://www.usdoj.gov/oip), and (3) *A Citizen's Guide to the FOIA* (2005, 85-page guide prepared by the House Committee on Government Reform). These federal publications include the text of the FOIA and an overview of the Privacy Act of 1974. You can download them free through links on the U.S. Department of Justice FOIA website: http://www.usdoj.gov/04foia. You should also consult the Society of Professional Journalist's Annual FOI Report published as a special edition of *Quill* magazine each September.
88. Freedom of Information Act of 1966, 5 U.S.C. §552, as amended (2002).
89. Privacy Act of 1974, 5 U.S.C. §552a, as amended (2000).
90. 5 U.S.C. §552a(6)(C)(b)(1–9).
91. 5 U.S.C. §552a(6)(C).
92. Federal Communications Commission FOIA website: http://www.fcc.gov/foia.
93. 5 U.S.C. §552 (Electronic Freedom of Information Act Amendments of 1996), 104 Pub. L. 231, 110 Stat. 3048 (1996).
94. *Id.*
95. Samantha Henig, *Pentagon Surveillance of Student Groups as Security Threats Extended to Monitoring E-Mail, Reports Show*, Chron. Higher Educ. (electronic edition), July 6, 2006.
96. Brea Jones, *FOIA After Forty*, Quill, Sept. 2006, at 28.
97 *Id.*
98. *Terrorism Developments*, Atlanta Journal-Constitution (news services), Aug. 17, 2006, at A4.
99. *Id.*
100. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2nd 119, 1 Med. L.Rptr. 2448 (1973).
101. Pub. L. 93-502, 88 Stat. 1561 (1974).
102. Executive Order 12,356, 3 C.F.R. (1983).
103. During his term, President Jimmy Carter, in contrast, issued an executive order that mandated a review of all classified material every 20 to 30 years, whereas the Reagan order required that a classified document be reviewed once, at the time the initial classification occurred.

104. Executive Order 12,958 (1995).
105. *Id.*
106. Brea Jones, *FOIA After Forty, supra,* note 96; Federal Communications Commission FOIA website: http://www.fcc.gov/foia.
107. *Department of the Air Force et al. v. Michael T. Rose et al.*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11, 1 Med.L.Rptr. 2509 (1976).
108. *Id.*
109. *Federal Aviation Administration v. Robertson,* 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975).
110. Pub. L. 94-409, §5(b)(3), 5 U.S.C. §552(b)(3), 90 Stat, 1241 (1976).
111. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).
112. *CIA v. Sims*, 471 U.S. 159, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985).
113. The MKULTRA project lasted from 1953 to 1966.
114. *CIA v. Sims.*
115. *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9, 99 S.Ct. 1705, 60 L.Ed.2d 208, 4 Med.L.Rptr. 218 (1987).
116. *U.S. Department of Justice v. Julian*, 486 U.S. 1, 99 S.Ct. 1705, 60 L.Ed.2d 208, 4 Med.L.Rptr. 218 (1988).
117. *Chrysler Corp. v. Harold Brown, Secretary of Defense*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208, 4 Med.L.Rptr. 218 (1979).
118. Executive Order 12,600 (1986).
119. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29, 1 Med.L.Rptr. 2471 (1975).
120. *Federal Open Market Committee v. David R. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979).
121. *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387, 9 Med.L.Rptr. 1737 (1983).
122. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 104 S.Ct. 1488, 79 L.Ed.2d 814, 10 Med. L.Rptr. 1477 (1984).
123. *U.S. Department of State v. Washington Post Co.*, 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358, 8 Med.L.Rptr. 1521 (1982).
124. *New York Times Co. v. National Aeronautics and Space Administration*, 852 F.2d 602, 15 Med.L.Rptr. 2012 (D.C. Cir. 1988).
125. *Id.*
126. *Id.*
127. *New York Times Co. v. National Aeronautics and Space Administration*, 920 F.2d 1002, 18 Med.L.Rptr. 1465 (D.C. Cir. 1990) (*en banc*); 782 F.Supp. 628, 19 Med.L.Rptr. 1688 (D.D.C. 1991).
128. *United States Department of State v. Michael D. Ray*, 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526, 19 Med.L.Rptr. 1641 (1991).
129. *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325, 22 Med.L.Rptr. 1417 (1994).
130. *United States Department of Defense v. Federal Labor Relations Authority*, 975 F.2d 1105 (1992).
131. *United States Department of Defense (1994).*
132. *Id.*
133. *Mark Dobronski v. the Federal Communications Commission,* 17 F.3d 275 (9th Cir. 1994).
134. *Sun-Sentinel Company v. United States Department of Homeland Security*, 431 F.Supp.2d 1258, 34 Med.L.Rptr. 1741 (2006).
135. *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774, 16 Med.L.Rptr. 1545 (1989).

136. *Id.*
137. *Id.*
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139. *Federal Bureau of Investigation v. Howard S. Abramson*, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982).
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160. 5 U.S.C. §552a(i)(1).
161. 5 U.S.C. §552a(i)(3).
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