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A right of access to the courtroom: the Burger Court's search for a definition

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A RIGHT OF ACCESS TO THE COURTRoom:
THE BURGER COURT'S SEARCH FOR A DEFINITION

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A RIGHT OF ACCESS TO THE COURTROOM:
THE BURGER COURT'S SEARCH FOR A DEFINITION

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The purpose of this study is to analyze Supreme Court pronouncements concerning a right of public access to criminal proceedings in order to determine to what extent the Court has recognized a constitutional guarantee of a public trial as it may apply to the accused and to the public and press. Because the question of public access to the courtroom is a relatively new one, this study is principally centered on recent cases which were decided exclusively by the Burger Court, providing a unique opportunity for a "case study." Consequently, a secondary thrust of the study is an analysis of the decision-making process of the present Court as demonstrated by a limited number of cases in a limited area.

Chapter I is devoted to a search for constitutional bases for a guarantee of public access to the courtroom, including an examination of general character, historical grounding in common law and custom, and sources in the First Amendment, the Sixth Amendment, the Ninth Amendment, and the due process clauses of the Fifth and Fourteenth Amendments of the U. S. Constitution. Chapter II considers and analyzes the parameters of a guarantee in terms
of qualifications, limitations, and restrictions in order to determine the applicability of the Court's definition of a right of access. Finally, Chapter III evaluates the Burger Court's decision-making in the courtroom access cases. An attempt is made to analyze the Court's judgments in the larger context of the long-standing free press-fair trial debate and the relatively current concern for a general right of access to governmental activities and proceedings.

The reader should be cautioned that this is a limited study of a limited area which does not attempt to address the many broader questions suggested herein. There is no attempt, for example, to address policy considerations or to make normative judgments. In short, the study attempts to discover what the Court has said on one narrow constitutional question and, in terms of consistency, clarity and practical applicability, how well it has spoken.
INTRODUCTION

There are certain assumptions underlying any democratic system of government. The most essential one is that government is under popular control, that it is responsive to popular will and subject to popular scrutiny. The American system presupposes the spirit of the Declaration of Independence in that the purpose of government is to "ensure" rather than to "deprive" and that when deprivation becomes necessary, such deprivation be accomplished within the bounds of law, fairly conceived and fairly administered.

It is an irony of such a system that dedication to fair treatment of individuals (as in the right to a fair trial) appears on occasion to conflict with dedication to popular control of government (as in the right to free speech and free press). Perhaps such a conflict is endemic to the system and there is no evidence that the framers of the Constitution had any solutions other than those which would be devised in the on-going "practice" of self-government.

Much attention has been paid to the adversarial character of certain rights and nowhere moreso than in the fair trial-free press debate. Only recently has there been much attention paid, and appropriately so, to the symbiotic relationship between fairness to
the accused and the right of the press (acting as a surrogate of the people) to scrutinize an institution of the government. As the courts have worked out techniques of courtroom management that protect the Sixth Amendment rights of the accused, concern has been focussed on not infringing on the areas of First Amendment rights so critical to self-government. Moreover, there is a recognition that the public has an interest in fair trial and the accused has an interest in open institutions of government.

The issue of access has added a new dimension to the old fair trial-free press debate. Prior to 1979, the only case in which the Court had considered the issue of public trial directly was in 1948 in *In re Oliver*. But unlike Oliver, the Gannett case in 1979 involved acquiescence of the accused so that the challenge was brought, not by the parties directly involved in the case, but rather by those arguing for an independent right of access for the public and the press. Indeed, the closure of courtrooms was not a significant issue until trial judges began closing courtrooms following the 1976 Nebraska ruling in which the Supreme Court struck down gag orders but left open the question of closure as a means of protecting trials from potentially harmful publicity.

Access to the courtroom has not been an isolated issue but rather is a part of a larger concern about
public access to all governmental institutions and activities. This concern is demonstrated in numerous cases in the decade of the '70's, some emerging from the Watergate incident, concerning such issues as access to prisons, government attempt to halt publication of sensitive material, reporter's privilege, and general freedom of information. As a result, Constitutional scholars and Court observers have been grappling with the broader issue, within these contexts, of the existence and extent of a "right to know". It is an issue which has yet to be definitively resolved by the Supreme Court of the United States.
I. CONSTITUTIONAL BASES FOR A RIGHT OF ACCESS

The practice of conducting criminal trials in public is a recognized feature of American judicial proceedings. It is a practice with strong antecedents in English common law, in the courts of colonial America, and in the constitutions of the states. The Sixth Amendment of the U.S. Constitution provides that "in criminal prosecutions, the accused shall enjoy the privilege of a speedy and public trial."

The source of the practice in the American system is traceable in English constitutional history to early Anglo-Saxon custom which was preserved and continued by the early Norman kings after the conquest of England in 1066. The Assize of Clarendon in 1166 gave evidence of and statutory requirement for the English practice of attendance of freemen at trials as a duty. The Frankish contribution to the system took the form of introducing the practice of conducting inquests by jury. As royal justice spread, the Anglo-Saxon tradition of openness was maintained as a

1 Forty-five states have specific constitutional guarantees of public trial. See Gannett Co. Inc. v. DePasquale, 99 S.Ct. 2898 (1979), Blackmun dissenting, note 3, p. 2923.

procedural matter and became the hand-maiden of the jury system. Indeed, there is evidence that the early Norman kings used the public proceedings as a way of demonstrating and extending the power of the king's justice across the land.

The practice of open trials preceded any recognition of rights for the accused. The infamous Star Chamber was attacked not for in camera proceedings but for the complete lack of protection for the accused in such matters as the confronting of witnesses, the calling of witnesses, the use of torture to extract information or confessions, and trial by an independent, uncoerced jury. Rights for the accused were finally won during the seventeenth and eighteenth centuries as common law lawyers and judges united with Parliament to abolish not only the Star Chamber but similar practices in other courts as well. During the entire period of struggle for the establishment of rights for the defendant, the practice of holding inquests and trials in public enjoyed an unbroken tradition. Eventually, the public trial was recognized as a right of free citizens and as an element of a fair trial, inasmuch as openness protected the other fundamental rights from abuse.

Hale, Blackstone, Bentham and others have discussed the tradition of public trial in terms of benefit to the Crown (or to the people) and the effective administration of justice, rather than in terms of beneficience to the accused. All have emphasized the importance of open proceedings in preserving the appearance of available justice and insuring the integrity of the system. Blackstone, citing Hale, emphasized the importance of publicity in his comment that "...the open examination of witnesses \textit{viva voce}, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk...".

The practice of open trials was firmly established in English common law at the time of the formation of the American colonies and, indeed, the writings of Hale and Blackstone were well-known to colonial leaders at the time of the American revolution and had great impact. It is reasonable to assume that the practice

\begin{itemize}
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in America was generally recognized as having the dual purpose of maintaining judicial integrity and assuring a fair trial to the populace and for the accused.\textsuperscript{6} There is no evidence that courts were closed during colonial times. Furthermore, the practice was explicitly promulgated in early colonial charters, documents of rights, and state constitutions. For an example, the Pennsylvania Frame of Government (1682) specified that "all courts shall be open."\textsuperscript{7}

It is clear that at the time of the framing of the Constitution and the Bill of Rights, the universally common practice in the United States was one of open trials. The Sixth Amendment, which contains the only explicit mention of public trial, is framed in terms of the accused. In addition, other provisions of the Constitution, according to commentators on the American constitutional system and pronouncements of the Supreme Court, have been found to speak implicitly to the openness of judicial proceedings.\textsuperscript{8} Specifically, the due process clauses of the Fifth and Fourteenth Amendments, the First Amendment, and the Ninth Amendment have been considered pertinent to the analysis and finding of a public trial right in the U.S. Constitution.

\textsuperscript{6}"Origins of the Public Trial," p. 256.

\textsuperscript{7}Quoted from Gannett v. DePasquale 99 S.Ct. 2898 (1979), 2929.

\textsuperscript{8}See text and notes supra and infra.
The Sixth Amendment

Having been framed explicitly in terms of the accused, the wording of the Sixth Amendment has precipitated some controversy as to whether or not the framers intended that right to belong solely to the accused or whether the guarantees of the amendment extend beyond the interests of the accused to the interests of the public as well. In Gannett v. DePasquale (1979), the Supreme Court, for the first time, directly addressed itself to the question of a public trial right independent of the accused. At issue in that case was an order by a state court which barred the public and press from a pretrial suppression hearing. In the opinion handed down by the Court, the justices (with one exception\(^9\)) limited their search to an analysis of the Sixth Amendment. The reasoning in the majority opinion and the concurring and dissenting opinions is instructive.\(^{10}\)

Justice Stewart, who wrote for the Court (in which only Justice Stevens joined without a separate opinion), took the narrow view of the Sixth Amendment,

\(^9\)Powell addressed the First Amendment question, Gannett, p. 2914.

\(^{10}\)The decision to uphold the state court's order for closure was by 5-4 vote. The impact and meaning of the decision in regard to a right of access was unclear.
finding in it no independent constitutional right of the public to attend criminal proceedings. Holding that the sole purpose of the Sixth Amendment is protection of the accused, Stewart based his argument on the lack of specific Constitutional mention of a right of access for the public. Borrowing Blackmun's dissent in Faretta v. California that the "specific guarantees of the Sixth Amendment are personal to the accused," Stewart went on to cite case precedent and commentary in several law review articles which support that contention.

While noting that the public has a strong societal interest in the conduct of trials, and that the tradition of public proceedings was established in common law, Stewart argued a differentiation between

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11 Gannett, p. 2905.
12 95 S.Ct. 2525 (1975), 2547.
14 Gannett, p. 2906. In citing Radin, Stewart may be misrepresenting the thrust of the commentary which argued for limitations on public access rather than against a right of public access per se.
15 See Estes v. Texas 85 S.Ct. 1628, 1653, for an explication of societal interests.
an "interest" and a "right," noting that not all common law rules have been elevated to the status of Constitutional rights.\textsuperscript{16} He further asserted that the interest of the public is adequately represented by the prosecutor, judge, and the jury, noting that a defendant is not permitted to waive his right to a jury trial without the consent of the judge and the prosecutor.\textsuperscript{17}

Justice Powell concurred with the finding regarding the Sixth Amendment \textsuperscript{18} as did Justice Rehnquist, the latter taking the hardest line in regard to closure. It may be noted that as a result of Singer v. U.S. \textsuperscript{19}, a defendant cannot compel a private trial. At issue in this case, according to the opinion of the Court \textsuperscript{20} and the Rehnquist concurrence \textsuperscript{21} was whether closure is prohibited by the Sixth Amendment if the participants in the litigation agree to do so. The Rehnquist answer was an emphatic "no."

Justice Blackmun, joined by Justices Brennan, White, and Marshall, dissented from the principal

\textsuperscript{16}Burger agreed with this distinction, Gannett, p. 2913.
\textsuperscript{17}Gannett, pp. 2907-2908.
\textsuperscript{18}See text infra for Powell's position concerning other Constitutional provisions.
\textsuperscript{19}35 S.Ct. 783 (1965).
\textsuperscript{20}Gannett, p. 2907.
\textsuperscript{21}Gannett, p. 2918.
findings of the majority in regard to the Sixth Amendment and the question of public access to the courtroom. Finding a strong and unbroken tradition of open proceedings in the common law and colonial antecedents as well as the original understanding of the Sixth Amendment, Blackmun found no basis for permitting closure of criminal proceedings, even with the defendant's concurrence. He noted that in the case of In re Oliver, the Court could find no instance at any level in the history of the U.S. in which courts had been closed to the public and none in England since the abolition of the Star Chamber in 1641. Furthermore, the Court has consistently recognized the importance and beneficial effects of open and public trials to the system of justice.

Blackmun took issue with the narrow interpretation given to the Sixth Amendment in Stewart's opinion by noting that the Court has previously recognized that the amendment may go beyond the interests of the accused to include other interests as well. In Barker v. Wingo dealing with the right to a speedy trial, in Singer v. U.S. dealing with the right to trial by jury, and in Faretta v. California dealing with

\[22 \text{Blackmun et al. concurred only on the question of mootness.}
\]
\[23 \text{The defendant had concurred in this instance.}
\]
\[24 \text{Oliver, p. 504. See note 13 supra.}
\]
\[25 \text{See Craig v. Harney 67 S.Ct. 1249 (1947); Sheppard v. Maxwell 36 S.Ct. 1507 (1966); In re Oliver 68 S.Ct. 499 (1948); Cox Broadcasting Corp. v. Cohn 95 S.Ct. 1029 (1975); Pennekamp v. Florida 66 S.Ct. 1029 (1946); and others.}
\]
\[26 \text{92 S.Ct. 2182 (1972).}
\]
\[27 \text{See note 19 supra.}
\]
\[28 \text{See note 12 supra.}
\]
the right to counsel, the Court has refused to reject societal interests in its considerations. Blackmun put particular emphasis on the Singer decision in supporting his contention that the casting of a right in terms of the accused gives no right to the defendant to compel the opposite, in this case, a closed proceeding.29

After reviewing the historical antecedents and relying heavily on Story's commentaries published in 1833,30 Blackmun concluded that the public feature of trials was assumed by the framers and that nothing exists to suggest that, by framing an amendment in terms of the accused, the accused would have the power to close proceedings to the public. The societal interests in the fair, efficient administration of justice are too overwhelming to have been ignored then or now. Societal interests in protecting against perjury, providing opportunity for new witnesses to come forward, and in deciding cases on the basis of truth and complete information do not always work to the interest of the accused. In addition, openness serves to provide public scrutiny of the behavior of the police, prosecutors, and judges, to educate the public on the administration of the system, and to maintain

29Gannett, pp. 2924-2925.

public confidence in that system, all of which are essential to the exercise of self-government.  

While giving a broad reading to the Sixth Amendment, Blackmun admitted no absolute requirement for open trials. Recognizing limitations on public access, he nonetheless rejected the notion that excluding unruly spectators, for example, provides precedent for closing the proceedings to all. He noted that the majority could cite no case in which the public was totally excluded from proceedings. He also admitted the necessity of protecting the defendant's right to a fair trial, particularly where publicity may prejudice the defense. Even though exceptions may exist, the presumption of an open trial demands that grounds for closure must be "narrowly drawn" and that the defendant must establish that closure is "strictly and inescapably necessary." In no instance is the burden on the public to provide justification for maintaining an open proceeding.

Despite the longstanding perception that conflict exists between the rights of the press and rights

31 Gannett, pp. 2930-31.
32 See Chapter 2 for a more extensive discussion of limitations.
33 Gannett, note 11, p. 2931.
34 Gannett, p. 2936.
35 See Chapter 2 for a discussion of closure standards.
regarding fair trial, traditionally cast as a First versus Sixth Amendment conflict, Blackmun was not convinced that the interests of the public and rights of a defendant are incompatible. To the contrary, publicity threats to fair trial are not always so unmanageable, as seen in Nebraska Press Association v. Stuart\textsuperscript{36} and Murphy v. Florida\textsuperscript{37}, as to prevent fair trial. In those cases where the Court has reversed convictions because of publicity, that publicity was abnormally high.\textsuperscript{38} Indeed, the harm anticipated is largely speculative.\textsuperscript{39}

The Blackmun opinion concluded that the public right of access to criminal proceedings in the Sixth Amendment includes the press as well. Both Sheppard v. Maxwell\textsuperscript{40} and Nebraska v. Stuart\textsuperscript{41} support the right of the press to report events occurring in the courtroom. Reporters "are entitled to the same rights as the general public" in regard to access.\textsuperscript{42}

\textsuperscript{36}96 S.Ct. 2791 (1976), See text and notes supra.

\textsuperscript{37}95 S.Ct. 2031 (1975). The case was marked by a high degree of publicity.


\textsuperscript{39}Gannett, p. 2938.

\textsuperscript{40}Sheppard, p. 1522. See text and notes supra, particularly Chapter II.

\textsuperscript{41}Nebraska, p. 2807.

\textsuperscript{42}Estes, p. 1631 quoted in Gannett, p. 2939.
In regard to the Sixth Amendment, the Gannett case presented the question of whether or not the public has a right, independent of the parties directly involved in a case, to attend criminal proceedings.\(^43\) That the public has an interest in judicial proceedings is generally recognized. Whether that interest constitutes a right in the Sixth Amendment is disputed. Burger, Stewart, Stevens, Rehnquist, and Powell would appear to find no such right; Brennan, White, Blackmun, and Marshall did. But the right of public access to the courtroom was not settled even by a 5-4 decision on the issue. The plethora of opinions created difficulties on a number of questions. One was the failure of the opinion to make a clear distinction between pretrial and trial procedures. Another was the fact that only Justice Powell was willing to look beyond the Sixth Amendment for a constitutional basis for a right to attend trials on the part of the public and press.

The result of the Gannett decision was widespread confusion as to the nature and extent of the ruling. More than 300 motions to close criminal court proceedings followed, more than 200 of which were granted.\textsuperscript{44} Such was the confusion that four justices made public comments in an effort to clarify the decision, particularly as to its applicability to trials.\textsuperscript{45} Despite their efforts, the Court eventually granted certiorari to review the closure of a trial in Virginia on appeal by Richmond Newspapers, Inc. and in this instance addressed the question of public access to the courtroom in the First Amendment.\textsuperscript{46}

While the Gannett decision did not reach a First Amendment right of access, some reference was made to it. The language of the Stewart opinion is interesting in this regard for the Justice seemed to indicate that if such a right did exist, the trial court had given appropriate deference to it by its actions in

\begin{itemize}
\item \textsuperscript{44}Bill Winter, "Richmond Case Widens Access, Spawns Debate," ABAJ 66: 946-947 (August 1980).
\item \textsuperscript{46}Richmond Newspapers, Inc. v. Virginia 100 S.Ct. 2814 (1980). The First Amendment to the U.S. Constitution says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." 
\end{itemize}
ordering closure. Specifically, he said "several factors lead to the conclusion that the actions of the trial judge here were consistent with any right of access (my emphasis) the petitioner may have under the First and Fourteenth Amendments." Stewart emphasized that the trial judge had conducted a proceeding to hear objections to the motion for closure, had balanced the rights of the press and public against the rights of the defendant, and had concluded that a "reasonable probability for prejudice" existed. Significantly, he explicitly interpreted the balancing as being one of competing societal interests rather than being grounded in any First Amendment freedoms. There is no indication that Stewart (and Stevens or Burger, by implication) rejected a First Amendment basis. Neither did they choose to reach it in the Gannett case.

As noted above, Powell went straight to the First Amendment issue in the Gannett case (he did not participate in the Richmond Newspapers case). Without extensive rationale, he based his finding of a right of public access on the public's need to have accurate information about the operation of the system and the fiduciary role of the press in providing that information to the public. Recognizing limitations on that right, and the responsibility of the trial court to

\[\text{Gannett, p. 2912.}\]
guard the right to a fair trial for the defendant, he was concerned that a constitutional standard be provided for trial judges in making judgments and moved to the task of defining the parameters of such a standard in light of due process imperatives.48

In both the Gannett and Richmond cases49 Justice Rehnquist flatly denied a First Amendment guarantee. Contending that the Court has refused to recognize such a right in the past, he cited Nixon v. Warner Communications50 Pell v. Procunier51 Branzburg v. Hayes52 Zemel v. Rusk53 Estes v. Texas, and Houchins v. KQED.54 But Rehnquist was the exception, for of the eight justices participating in the Richmond decision, seven found a right of public access to the courtroom in the First Amendment.

The judgment of the Court in the Richmond case was announced by Chief Justice Warren Burger but no one joined his opinion. Instead the other justices

48 Gannett, pp. 2914-2915.
49 Gannett, p. 2918 and Richmond, p. 2843.
52 92 S.Ct. 2646 (1972).
53 85 S.Ct. 1271 (1965).
participated in the three concurring opinions filed in the case. As in the Gannett case, the Court did not speak with one voice except in the finding of a First Amendment right.

Citing historical evidence of a tradition of open trials and the strong presumption of openness inhering in the American system of justice, Burger concluded that the societal interests in keeping trials open were basic to the American system of a government controlled by the people, and that the press played an essential role in informing the public. He demonstrated no concern, as he did in the Gannett case, with the lack of explicit Constitutional mention of the right in terms of the public but was content that the Bill of Rights were adopted on a "backdrop" of a long history of open trials and concluded that the right to attend "gives meaning" to the explicit guarantees of the First Amendment.

In this vein, he noted that "free speech carries with it some freedom to listen" citing several cases which support a broad reading of the First Amendment to allow a full range of activities in support of First Amendment rights to free speech, press, and assembly. For example, he quoted language from Kliendienst v.

55 Richmond, p. 2825.
56 Richmond, p. 2827.
Mandel\textsuperscript{57} ("right to receive information"), and from Branzburg v. Hayes\textsuperscript{58} ("right to gather information"), and concluded that such rights would have no meaning without a corollary "right to access". The rights to speech and press would be empty without a right to information\textsuperscript{59} The trial judge erred in not giving full consideration to these rights in making a judgment regarding closure\textsuperscript{60} (The judge was acting in part on a Virginia statute which allowed closure at the discretion of the trial judge.)

The Stevens concurrence\textsuperscript{61} is noteworthy for its discussion of two past cases which would seem to deny right of access or a "right to know".\textsuperscript{62} In Saxbe v. Washington Post, the Court had allowed restrictions on the press so long as such restrictions did not single out the press in a discriminatory way. Justices Brennan, Marshall, and Powell took strong exception to the conclusion. In Houchins v. KQED, Justices Brennan and Powell were joined by Justice Stevens in objecting

\textsuperscript{57} 92 S.Ct. 2576 (1972), 2581.
\textsuperscript{58} 92 S.Ct. 2646, 2656.
\textsuperscript{59} Richmond, p. 2827.
\textsuperscript{60} Richmond, p. 2829.
\textsuperscript{61} Richmond, pp. 2830-31.
\textsuperscript{62} See Rehnquist dissent in Gannett.
to similar restrictions permitted by the Court's opinion on the flow of information. Stevens concluded that had Blackmun and Marshall participated in the Houchins decision the Court's conclusions would have been quite different. He further noted the irony in the Court's willingness to recognize a right of access of the press to the courtroom in the instant case while the Court was willing to deny a right of access to prison facilities (Houchins), particularly given his perception that the general public has a more powerful ability to voice objections than do prisoners.

In the first part of the Richmond opinion in which they concur in the judgment, Justices Brennan and Marshall also deal with the Saxbe and Houchins cases, as well as Pell v. Procunier, Zemel v. Rusk, and Estes v. Texas, in which the Court seems to have refused to recognize an enforceable right of access to information about government operations. They caution a careful reading of those cases and confine the rulings to a recognition by the Court that such access is "subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality," concluding that these cases can be cited as neither upholding or denying a right of public access to
information. Employing the terms "freedom of expres­sion" and implying terms such as "freedom of communi­cation" and "right to gather information", these Justices promulgate the theory that the First Amendment has a greater role than mere protection, to wit, it also has the "structural role" of fostering and pro­moting a meaningful exercise of what it protects.63

This theory was not newly proposed here but was expressed by Brennan in an address printed in the Rutgers Law Review in 1979. There Brennan proposed two models dealing with the rights of the press. One was the "speech model" which he defined as de­serving absolutist protection. The other, the "structural model", includes an umbrella of all press functions, such as newsgathering and news disseminating, which had to be weighed against other societal interests. Responding to protests by the press to the Gannett decision, Brennan as­serted that neither model fit the particular situa­tion in that case since the concerns were for the rights of the public as well as the press and because Gannett was confined to ruling on the Sixth rather than the First Amendment.64 Since the Court finally

63Richmond, pp. 2832-2833.

reached the First Amendment question in the Richmond case, he could employ the "structural model" and, in fact, does so in providing an analytical structure for his opinion.

Use of the structural model means that Brennan was basing his findings not just on history and tradition, but also on the values served in maintaining popular control of the activities and institutions of government. Trials, being a genuine governmental proceeding, must be accessible in order to provide a check on trial procedures and in order to enhance the factfinding function of the courts through publicity.65 The availability of transcripts at the end of the trial is "no substitute for" the actual presence of people at trial.66

Due Process - The Fifth and Fourteenth Amendments

The Fifth Amendment (U.S. Constitution) guarantees that "no person shall...be deprived of life, liberty or property, without due process of law...." The Fourteenth Amendment (U.S. Constitution) states "...nor shall any State deprive any person of life, liberty or property, without due process of law...." The due process clauses as applied to criminal procedures have been held, over the long course of the

65 Richmond, p. 2838.
66 Richmond, p. 2839.
Court's history, to mean that procedures must be fair. Fair procedures were those provided specifically in Amendments Four, Five, Six, and Seven (U. S. Constitution).

In its early history, the Court held to a doctrine that certain guarantees were applicable only to the national government. It did so even after it demonstrated willingness to apply First Amendment guarantees to the states via the Fourteenth Amendment. This allowed the Court to reform federal procedures without moving into state procedures, which it began to do as early as 1914 with Weeks v. U.S. The process was accomplished in a case-by-case, incremental manner with much importance being given to the safeguards listed in the Bill of Rights and the onus being placed on federal judges to guard the purity and fairness of procedures which were deemed essential to liberty and fairness.

In the matter of state procedures, the Court intervened only against the most blatant of state practices. Despite a sensitivity to procedural rights,

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68 232 U.S. 383 (1914).
the Court showed a reluctance to soften judicial
self-restraint and interfere with the states. In­
stead, the Court began to apply (by the early 40's)
a fair trial rule in which it refused to strike down
state proceedings based on a violation of a specific
Bill of Rights provision, but rather preferred to
decide "on the basis of the totality of the circum­
stances whether the trial as a whole had been 'fair'."70

The rule, in practice, proved to be vague and
was gradually eroded in a number of incremental de­
cisions in which the Court incorporated various
provisions of the Bill of Rights into the due process
clause of the Fourteenth Amendment.71 This slow pro­
cess culminated in Mapp v. Ohio in which the Court,
for the first time, made a criminal procedure ele­
ment of the Bill of Rights directly applicable to
the States.72 The case was followed by others, such
as Gideon v. Wainwright73 Escobedo v. Illinois,74

70 Shapiro, p. 240.
71 Shapiro, p. 241.
72 367 U.S. 643 (1961), specifically the search
and seizure provision of the Fourth Amendment.
73 372 U.S. 335 (1963), the right to counsel in
the Sixth Amendment.
74 378 U.S. 478 (1964), the right to counsel and
the right against self-incrimination in the
Sixth and Fifth Amendments respectively.
Miranda v. Arizona\textsuperscript{75}, and Duncan v. Louisiana\textsuperscript{76}, in which the Court clearly established a uniform, national policy of procedural standards on the states and localities.\textsuperscript{77}

In the matter of a public trial, the key case in which the Court held that the Fourteenth Amendment may hold a basis for a right was \textit{In re Oliver} (1948). Repeated reference was made to it in the opinions proffered in the current public trial cases discussed above. In Oliver, the Court specifically ruled that failure to provide a public trial was a violation of due process of law. Justice Black cited the heritage of English common law and what he referred to as "the universal rule against secret trials." He also noted that the open trial was "an accompaniment of the ancient institution of jury trial."\textsuperscript{78} Without specifically discussing them, Justice Black made reference to other benefits which public trials may "confer upon our society."

\textsuperscript{75} 384 U.S. 436 (1966), the right to be advised of Fifth and Sixth Amendment rights by police.

\textsuperscript{76} 391 U.S. 146 (1968), the right to a jury trial in the Sixth Amendment.

\textsuperscript{77} Shapiro, p. 305. For additional discussion of the incorporation of the fair trial amendments, see H. Abraham, \textit{Freedom and the Court} (New York: Oxford University Press, 1977), pp. 71-83.

\textsuperscript{78} Oliver, p. 503.
The Court has applied the due process guarantee in the Fourteenth Amendment in other cases as well. For example, it did so in Mayberry v. Pennsylvania79 and in Baker v. Utecht.80 Subsequently, in all of the recent cases dealing with a right to a public trial in state proceedings, whether based on First or Sixth Amendment grounds, the Fourteenth Amendment has been incorporated. Seldom, however, has there been direct reference in these cases to specific due process grounds. Due process considerations do come into play where various justices attempt to establish procedures for limiting attendance at trials or for actual closure. These will be discussed in Chapter 2.

In the case of Levine v. U.S.,81 the Court ruled that the due process clause of the Fifth Amendment requires a public proceeding. Likewise, in a more recent case in federal court, U.S. v. Cianfrani,82 a presumption of openness was held essential to due process. The Third Circuit court also upheld the right of access in the Sixth Amendment, finding an independent public right in order to promote societal interests.

79 91 S.Ct. 499 (1971).
80 68 S.Ct. 204 (1947).
81 80 S.Ct. 1605 (1960).
82 (1978, CA3 Pa) 573 F2d 835.
The Ninth Amendment

The Ninth Amendment (U.S. Constitution) states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In the Richmond opinion, Chief Justice Burger used the Ninth Amendment to refute the argument that no right to attend public trials is protected by the U.S. Constitution because there is no specific mention of such a right. Noting that the Founding Fathers included this amendment in order "to allay fears" about the possible exclusion of rights not enumerated, and that the Court has previously acknowledged some rights as being implicit, Burger held that the right to attend public trials was implicit in the First Amendment.

Justice Rehnquist, in his dissent in the Richmond case, flatly and without exception, rejected the use of the Ninth Amendment as pertinent to the case. No other justice made use of Ninth Amendment grounds for determining the case, although the substance of the Ninth Amendment was implicit in their constitutional interpretations of the First Amendment.

The Ninth Amendment has been largely disregarded by scholars and Supreme Court Justices. Authored by

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83 Alexander Hamilton, The Federalist, #84.
84 Richmond, p. 2829.
James Madison, it grew out of his apprehension that the enumeration of rights in the Bill of Rights might be construed as a denial of other unenumerated rights. The amendment assumes that unenumerated rights exist which require protection and supports the principle of limited government inherent in the letter and spirit of the Constitution. If the inclusion of the amendment were to be taken seriously in constitutional analysis, it would not be outside the purview of a body engaged in judicial review to search for those rights.

The Supreme Court has recognized the existence of penumbras to the Bill of Rights, that is, that certain rights emanate from the enumerated rights which give those guarantees life and substance. The notion that unenumerated rights are those which enhance the exercise of free and open government would certainly support a claim that a right of access to criminal trials supports and fulfills a constitutional scheme of informed discussion protected by the First Amendment. That is precisely the argument made by the concurring Justices in the Richmond case, without recourse to the Ninth Amendment.

The very open-ended character of rights provided by the Ninth Amendment may very well be the reason for the reluctance to employ it. Justice Hugo Black essentially ignored the provision and he was noted for
judicial activism and interpretivism. It is, perhaps, no wonder that others, with Black, would find the jurisprudential implications of the provision cause for discomfort. A too enthusiastic embracing of the amendment may not serve principled judicial enforcement but might instead so enhance the Court's function of judicial review as to seriously overwhelm the political branches of government in a manner inconsistent with a commitment to representative democracy. Certainly those who advocate judicial restraint might think so and continue to ignore the Ninth Amendment. 85

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II. QUALIFICATIONS AND LIMITATIONS ON A RIGHT OF ACCESS

Given that the consensus of the Supreme Court (all but Rehnquist) is that some right of public access to judicial proceedings exists, difficulties arise when one is faced with the task of defining the parameters of such a right. If the Court's finding of a right seems strained and circuitous in terms of constitutional sources, it is even more so in terms of temporal questions of applicability to the totality of the judicial process, in terms of functional limitations on access, and in terms of standards of limitation on access and how they are to be imposed.

As mentioned above, the Court in Gannett v. DePasquale, failed to make a clear statement as to the applicability of the ruling on trials as opposed to pre-trial proceedings. The result of that failure was widespread confusion as to the scope of the ruling as it applied to full trials. At issue in the Gannett case was closure of a pre-trial hearing; the substance of the decision, by 5-4 vote, was no finding of a Sixth Amendment right of access to pre-trial proceedings. But the decision of the Court was...

not definitive. Justice Stewart often used the terms "trial" and "pre-trial" interchangeably in his opinion for the Court, making unclear the applicability of his judgment to trial proceedings. Indeed, Chief Justice Burger alone in his concurring opinion addressed the temporal question.2 Noting that the Sixth Amendment specifically speaks to "trial", Burger drew a distinction between a pre-trial proceeding, such as a suppression hearing, and the actual trial itself and concluded that the presumptions are different for each. Pre-trial activities have traditionally been private and not considered part of the trial unless and until the results are actually offered as evidence.3

Whatever the reasons for the lack of clarity by the Court in the matter of temporal applicability, the resultant confusion moved four Justices to speak publicly on the matter.4 Burger recapitulated his view that the opinion in Gannett applied to pre-trial proceedings only. Blackmun, although opposed to the decision, was convinced that the ruling would allow closure of full trials as well as pre-trial proceedings. Powell and Stevens, respectively, expressed

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2Gannett, pp. 2913-2914.
3Gannett, p. 2914
4Bill Winter, p. 947.
misgivings about the failure of the Court to address First Amendment grounds and the need for new court rules or perhaps legislation to deal with trial closure. Nonetheless, perplexity reigned as witnessed by various news accounts and commentaries and by the number of motions for closure in the lower courts.

Seven days following the Gannett ruling, the Virginia Supreme Court upheld closure of a trial in Virginia and on October 9, 1979, the United States Supreme Court granted certiorari to hear arguments in Richmond Newspapers, Inc. v. Virginia. Many commentators guessed that the Court would focus again on the Sixth Amendment and provide some clarification as to its applicability to full trial proceedings in terms of a right of access. Instead, in its opinion handed down on July 2, 1980, the Court went directly to the conclusion that the First and

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5 D.G. Stephenson, p. 64.

6 See Goodale, "Gannett Means What It Says, But Who Knows What It Says?" Nat'l L.J. (October 15, 1979), and Stephenson, "Rights in Continuing Conflict...."

7 Winter, p. 947.

Fourteenth Amendments guaranteed a right of access of press and public to criminal trials.\(^9\) Justice White, in a brief concurring opinion, noted that the case and indeed the First Amendment question would have been unnecessary had the Court followed the lead of the four Gannett dissenters in finding a Sixth Amendment presumptive prohibition against closure.\(^10\) He did not admit that the Court might reasonably have addressed the First Amendment question in its Gannett ruling. The other Justices failed to comment on the matter except for Blackmun who complimented the Court on its reliance on legal history in making its determination. He also expressed his gratification in seeing "the Court wash away at least some of the grafitti that marred the prevailing opinions in Gannett." He re­proved Burger (who wrote the opinion in the Richmond case) for making the distinction between pre-trial proceedings and the trial itself in his Gannett con­currence and yet joining the Court's judgment and thereby contributing to the resultant confusion.\(^11\)

\(^9\) In his concurring opinion (Richmond, p. 2340), Justice Stewart specifically extended the guarantee to include civil trials as well. There was a suggestion in the Gannett case that civil proceedings were included. Both Justice Blackmun and Justice Rehnquist cite two cases involving civil actions, Nixon v. Warner Communications 98 S.Ct. 1306 (1978) and Pell v. Probynur 98 S.Ct. 2800 (1975). See Kelley, p. 554.

\(^10\) Gannett, p. 2830.

\(^11\) Gannett, p. 2842.
Blackmun reiterated his position that the Gannett decision was erroneous in its interpretation of the Sixth Amendment and in its application to pre-trial suppression hearings.¹²

Otherwise, the Court failed to address the question of access to pre-trial proceedings based upon First Amendment grounds. That question remains open, presumably awaiting another case in which such argument might be made.

The distinction between pre-trial proceedings and full trials has been discussed by commentators and by the Court itself in *dicta*. The Gannett case was, in many ways, a "logical outgrowth"¹³ of Nebraska Press Association v. Stuart.¹⁴ In that case, the Supreme Court struck down a *gag order*¹⁵ restraining publication by the press of information received in a pre-trial hearing. The *gag* order was deemed to be

¹²Gannett, p. 2842.

¹³Kelley, p. 555.

¹⁴96 S.Ct. 2791 (1976).

prior restraint against which there exists a high presumption of unconstitutionality which imposes a heavy burden not overcome by the circumstances. Chief Justice Burger noted that while "it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."

Though it prohibited restraint placed on the press to publish information already in its possession, the Court in Nebraska did not address the question of whether or not the trial judge could prevent the press and the public from receiving information by issuing exclusionary or closure orders. In fact, in a footnote, Burger alluded to existing guidelines that recommended closing of pre-trial proceedings, but he expressly refused to confront that issue. By implication, several commentators have noted, courts were left free to inhibit news


17 Nebraska, p. 2803.


19 Nebraska, p. 2805.
gathering at its source. Thus, after Nebraska
the main point of emphasis in the free press/fair
trial controversy moved from prior restraints to
exclusionary orders with commentators expressing
differing views as to the constitutionality of
those orders. Courts began to resort to restrict­
ing access to pre-trial hearings and sealing docu­
ments and records of such hearings from the public.

What is the material difference between pre­
trial and trial proceedings that has led to such
confusion in the Court's stand? In Gannett, Burger
asserted that the stuff of modern pre-trial proceed­
ings--such as the exclusionary rule and pre-trial
motions to suppress evidence--were unheard of at the


time of the framing of the Constitution. Stewart said that no right of the public to attend pre-trial hearings existed in English common law, that the purpose of pre-trial hearings was to prevent contaminated information from reaching the jury and thus infringing on fair trial. Suppression hearings, although unknown in early times, rationally served the same purpose.

There is a great deal of commentative literature, however, to refute this viewpoint and Justice Blackmun's partial dissent joins that view. Indeed, an opinion out of the Third Circuit in 1978 upheld the view that pre-trial suppression hearings fall within the Sixth Amendment's guarantee of a public trial. According to this argument, pre-trial hearings are so similar to trials and so often determinative.

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23 Gannett, p. 2913.
24 Gannett, footnote, p. 2910.
25 See "Right to Attend..." Columbia, as an example.
26 Gannett, p. 3933.
28 One judge rejected Sixth Amendment grounds in favor of First Amendment grounds.
of the outcome of litigation, that any constitutional right of access would be applicable. Blackmun thought this particularly true of suppression hearings. He wrote that, "unlike any other proceeding apart from the trial itself, the suppression hearing implicates all the policies that require that the trial be public." He went on to argue that pre-trial hearings, and suppression hearings in particular, are so important to the system of justice as to be considered "part of the trial." In fact, the suppression hearing may be the only proceeding held and may be the point in the total procedure where misconduct by police and other parties may be most in evidence. In addition, the most relevant evidence might be suppressed without public scrutiny if the procedure is closed. He went on to deny that the interest of the public is protected by the prosecutor, judge, or other parties, given the possibility of connivance among them. Closure of these proceedings would undermine the confidence of the public and the appearance of justice. Therefore, the

29It is in pre-trial hearings that decisions are made in regard to incarceration pending trial or the setting of bond for bail. Also, plea bargaining arrangements are made in this phase which can result in the dropping of charges or the incarceration of defendants on arranged guilty pleas.

30Gannett, p. 2934.
31Gannett, p. 2935.
32Gannett, p1 2934.
33Gannett, p. 2935.
same values which would require public trials would extend to pre-trial suppression hearings as well, according to this argument.

Those who would argue for closure of pre-trial suppression hearings follow the reasoning offered by Justice Stewart in Gannett when he posed the problem of publicity at this stage as being "particularly acute." While prejudicial information can, by various means, be kept from jurors at full trial, it may be impossible to shield jurors from such information that has been publicized via a pre-trial hearing. Thus, Justice Stewart argues, fair trial may be jeopardized and closure is often "one of the most effective methods that a trial judge can employ..."34

But Blackmun gave significant weight to the importance of suppression hearings as distinguishable from other pre-trial proceedings, such as preliminary hearings, to determine probable cause for binding a defendant for trial, grand jury procedures, coroner's inquests, and others. These, he contended, are not critical to the system and thus the Court's reliance on statutory law and precedent and legal history dealing with these latter procedures do not serve to support private suppression hearings with which

34Gannett, p. 2910. See also Burger's concurrence in Gannett, p. 2914.
they do not deal. He further contended that where there is no pre-trial suppression hearing (and there is no federal regulation that states conduct such hearings), objections to evidence are made after presentation in "open court" and thus the temporal factor should not be used as a standard for justifying closure on grounds of protecting jurors from inadmissible or contaminated evidence.35

But Blackmun, as well as the other members of the Court, recognized that there are few absolutes in the matter of seemingly conflicting rights, and all recognize the importance of insuring to the defendant a fair trial. Despite the strong presumption in favor of open proceedings (whether found in the First or the Sixth Amendment and whether applicable at pre-trial or trial stages), courts have recognized exceptions, limitations, and restrictions even when the accused has objected to such exclusions.

For example, the Supreme Court and other federal courts have held that a requirement of public trial does not include all of the public or even all segments of the public. In Sheppard v. Maxwell,36 the court allowed restrictions on newsgathering techniques.

35Gannett, p. 2935.
36See note 15 supra.
In Estes v. Texas, the Court restricted the use of electronic media. Again, in Nixon v. Warner Communications, Inc., the Court held that there is no requirement that tapes admitted into evidence be released to the general public. There is, therefore, no recognizable right for unlimited public access to all that occurs at a trial.

In addition, as noted in the Gannett opinion, exclusion has been upheld to avoid embarrassment to witnesses, to protect spectators from obscene or offensive testimony and to maintain order and decorum. Courts have also allowed exclusion to avoid prejudice to the

37 3785 S.Ct. 1628 (1965).

38 On January 26, 1981, in Chandler v. Florida (49 LW 4142), the Supreme Court refused to declare unconstitutional a Florida court rule permitting the presence of broadcast media (radio and TV) in the courtroom absent a definitive showing by the defendant of a specific due process violation. In so doing, the Court rejected a contention that its Estes ruling had established a per se constitutional rule barring broadcast coverage of courtroom activities. The narrow ruling was that the Court would not interfere with Florida practices "absent a showing of prejudice of constitutional dimensions." (p. 4147).

39 See note 9 supra.


41 Gannett, p. 2910.
state, to prevent overcrowding, to preserve confidentiality, to prevent the intimidation of witnesses, and to protect national security concerns. In both the Gannett and Richmond decisions, various justices gave recognition to reasonable restrictions and limitations imposed by trial judges for the convenience of the court and the protection of certain considerations not necessarily of a constitutional nature. There is no dicta in either Gannett or Richmond to indicate a change in limitations of this nature on public access to the courtroom.

Given that neither a recognizable Sixth Amendment guarantee nor a recognizable First Amendment guarantee of a public trial is absolute to either the defendant on the one hand or to the press and public on the other, what constitutes grounds in the eyes of the Supreme Court for closure to insure a fair trial? And given the establishment of identifiable grounds, what procedures must a trial judge follow in order to close proceedings to the public?

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43 U.S. v. Kobli (1949, CA3 Pa) 172 F 2d 917.
45 Perez v. Metz (1977, SD NY) 459 F Supp 1131.
47 Richmond, p. 2840.
There is no dispute that the trial judge is responsible for the conduct of the trial and for the protection of the interests of the defendant and public alike in the fair administration of justice within the framework of Constitutional guarantees.\textsuperscript{48} In carrying out this responsibility, the trial judge must not only rely on interpretations of Court rulings on the broad questions but must also look to the Court and case precedent for guidance in applying those rulings in specific cases.

In Gannett, Justice Stewart, joined by Justice Stevens, would allow closure on the consent of the prosecutor and defendant. There is no indication that any consideration of circumstances or mitigating factors is necessary. Rehnquist, who took the hardest line, specifically stated that the participants may cause closure "for any reason" whatsoever, for the Justice is absolutist in finding no right of access for the press and public.\textsuperscript{49} Chief Justice Burger, alone, in restricting application to pre-trial situations, offered no tests or standards for closure beyond the defendant's request.\textsuperscript{50}

\textsuperscript{48}See Shepherd and Nebraska.

\textsuperscript{49}Gannett, p. 2918.

\textsuperscript{50}Gannett, pp. 2913-14.
The dissenting group (Blackmun, White, Brennan and Marshall), which found a right of access in the Sixth Amendment, was naturally more circumspect and placed the burden of proof on the defendant to establish that closure is "strictly and inescapably necessary" for a fair trial.51 Deigning to lay down an absolute standard, Blackmun suggested a minimum showing by the defendant of (1) concrete and specific evidence of "substantial probability of irreparable damage," (2) evidence of "substantial probability" that measures other than closure are inadequate for protection of fair trial rights, and (3) evidence of positive, "substantial probability" that closure will work.52 Blackmun went on to caution that high levels of publicity do not necessarily or automatically work to the detriment of a defendant's rights to a fair trial. In fact, he refers to the Nebraska decision in noting that instances of reversals on those grounds are "relatively rare" and that the harm feared is usually highly speculative.53 If the defendant is able to show the above and the trial judge orders exclusion, such exclusion orders should extend only to the narrowest limits necessary and should be temporary. Accurate records for future scrutiny are essential. As

51Gannett, p. 2936.
52Gannett, p. 2937.
53Gannett, p. 2938, Nebraska, p. 2800.
to the due process rights of those subject to exclusion, Blackmun would not require an evidentiary hearing, nor would he require that the public be given advance notice of the exclusion. He would, rather, give those directly subject to exclusion opportunity to voice objections in court prior to the order taking effect and would require the court to place its reasons for closure in the trial record. The press would enjoy no special due process rights apart from the public at large.\(^5^4\) Blackmun indicated that he would not erect a standard here as strict as he might advocate in the instance of a First Amendment question, rejecting the assertion that closure is comparable to prior restraint. In fact, as noted in Chapter 1, he specifically refused to address the issue of access on First Amendment grounds in this case.\(^5^5\)

Justice Powell in addressing First Amendment considerations in his Gannett opinion did not see the necessity of as strict a standard as would be required in a prior restraint situation such as Nebraska. He even found the Blackmun standard too inflexible even to permit exclusion where necessary for fair trial.\(^5^6\)

\(^5^4\)Gannett, p. 2939.

\(^5^5\)Gannett, p. 2940.

\(^5^6\)Gannett, p. 2915.
Rather, he would advocate a balancing of First and Fifth Amendment considerations in which no rights were subordinated to others. While rejecting the stricter standard, Powell found some relevance to this case in the Nebraska situation where the Court proposes that the trial judge must consider alternative means of protection, hear objections of those actually present and subject to exclusion, and place the burden on the defendant (and on the State if it joins in the request for closure) to show the necessity for it. The public and the press have responsibility for putting forth viable alternative means which would serve to mitigate any harm to fair trial.\(^57\)

In the instant case, Powell found that the trial judge had acted appropriately and thus he concurred in the judgment.

The alternative to closure alluded to in various opinions, though not discussed in detail, are those enumerated at length in both Sheppard v. Maxwell and Nebraska Press Association v. Stuart. They include \textit{voir dire}, jury sequestration, jury instruction, continuance, severance, change of venue, change of venue, sealing of the transcript, and control of courtroom atmosphere and decorum. The adequacy of these measures to insure a fair trial in the presence

\(^{57}\text{Gannett, p. 2916.}\)
of press and public attention is uncertain in the minds of some of the justices, particularly those five in the Gannett majority who would allow unrestricted closure by agreement of trial participants. Their decision in the Richmond case would indicate greater faith in those measures.

But in the Richmond case, the circumstances differ. Here the Court by 7-1 ruling (Powell did not participate), found a definitive right of access to full trials in the First Amendment. Great lip service is given to the importance of First Amendment rights and their structural role in the American system of government in general and the administration of justice in particular. By implication, the opinion of the Court and the concurring opinions filed recognized that such rights were not absolute and one might expect some delineation of a standard of exception. But as Blackmun pointed out in his concurrence, such was not the case.

Chief Justice Burger found fault with the trial judge's closure decision in that it failed to provide reasons for closure and made no inquiry as to alternative measures available short of closure. Burger used the term "overriding interest" to describe circumstances which might warrant closure.58 He did not

58 Richmond, p. 2829-30.
define his meaning. Justice Stevens also could find no record of justification, implying that such a record might present acceptable reasons for closure. Again, there was no definition of what might be justifiable.59

Justice White would, apparently, allow exclusion under "narrowly defined circumstances."60 Justices Brennan and Marshall mention "countervailing interests" which might tip the balance away from a First Amendment presumption of openness, but did not in this case define those interests and how they might be protected. These Justices were troubled that the state had provided the judge with "unfettered discretion" in ordering closure.61 Justice Stewart spoke of "reasonable limitations upon the unrestricted occupation of a courtroom" and alluded to alternatives available in trial situations.62

59 Richmond, beginning at p. 2830. Following the Gannett decision, one commentator (Goodale, note 6 supra) speculated that Stevens might ultimately favor a Blackmun standard if the Court ever recognized a right of public access to full trials. His reasoning was based on the fact that Stevens had voted for access in previous cases. Indeed, Stevens referred to those cases in his Richmond concurrence but failed to endorse any particular standard.

60 Richmond, p. 2830.

61 Richmond, p. 2839.

62 Richmond, p. 2840.
Blackmun, who had suggested a fairly strict test in his Gannett dissent, found the standards suggested in both these cases to be "troublesome" and marked by "uncertainty" as to their nature and strictness. He agreed with his colleagues that the trial judge in this case had abridged the public's First Amendment interests but obviously had some concern for trial judges in future cases faced with the task of balancing competing rights and interests.63

63 Richmond, p. 2842.
III. CONVERGENCE OF PRECEDENT IN ANALYZING A RIGHT OF ACCESS

An analysis of the rulings of the Supreme Court in the Gannett and Richmond decisions and their legal impact in regard to a right of access of the public to judicial proceedings necessitates an examination of the precedential bases of those decisions. On the surface, these cases would appear to attach to the long line of cases dealing with what has been commonly referred to as the "fair trial-free press controversy". However, of equal importance are those cases in which the Court has dealt with the question of access to governmental information and institutions. Indeed, there is a convergence of these two lines of precedent employing several threads of constitutional thought.¹

solution since both seem to occupy preferred positions in the Constitution. The controversy is generally centered around the effects of publicity on a defendant's right to a fair trial. Such publicity may adhere prior to trial thus prejudicing the jury pool or it may involve publicity and the methods of newsgathering during trial which may prejudice the ability of the defendant to secure a fair trial. When adversarial conflicts have arisen between these two compelling interests of free and open discussion of public issues on the one hand and justice in the courtroom on the other, the Supreme Court has had to balance the two and, in doing so, attempt to define a state of law capable of resolving such conflicts.

The controversy has a long and involved history. Early cases centered on the use of the contempt power to control the activities of the news media vis-a-vis the criminal justice system. Over the years, the Court gradually refined the doctrine of contempt by publication until, by mid-century, a trial court's power to use contempt against the press had been so contracted as to be useful only in controlling disorder

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2 U.S. v. Carolene Products Co. 304 U.S. 144 (1938).
in the courtroom and in areas immediately adjacent thereto.³

The next line of defense in the Court's arsenal against prejudicial publicity was the tactic of reversing convictions on due process grounds.⁴ Reversals were based on the statement of Justice Jackson in the Shepherd case that "newspapers in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. The convictions...do not meet any civilized conception of due process of law. That alone is sufficient...to warrant reversal."⁵ Two notorious cases, Estes v. Texas⁶ and Sheppard v. Maxwell⁷, involved reversals of highly celebrated criminal convictions, the latter exemplifying the worst and most flagrant documented

³Principal 20th century cases dealing with the contempt power are Toledo Newspaper Co. v. U.S. 247 U.S. 402 (1917); Bridges v. California 314 U.S. 252 (1941); Times Mirror Co. v. Superior Court 314 U.S. 252 (1941); Pennekamp v. Florida 328 U.S. 331 (1946); Craig v. Harney 331 U.S. 367 (1947); Maryland v. Baltimore Radio Show 333 U.S. 912 (1950).


⁶35 S.Ct. 1628 (1965).

abuse on the part of the judiciary, the press, and law enforcement of the fair administration of justice. The Sheppard case represents the most definitive statement by the Supreme Court in regard to press interference with due process.

In Sheppard, the Court attempted to provide guidance to trial court judges (who were finding themselves subject to reversal if they improperly balanced First and Sixth Amendment interests) in determining how to protect fair trial rights in the face of prejudicial publicity. In its decision, as previously noted, the Court listed those procedural safeguards available to the trial court while noting that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." The Court's suggestions reaffirmed the trial judge's power to control the courtroom and provided precedent for affirmative judicial actions to protect the integrity of fair trial. Significantly, the Court went beyond in-court measures and recommended that the trial judge control the release

8 See Chapter II.

9 Sheppard, 384 U.S., 363.

of information to the press by witnesses, counsel, and police, specifically recommending prohibitions against "extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters..."11

The impact of the Sheppard decision was to revive the use of the contempt power to control the effect of prejudicial publicity. Following the decision, there was a proliferation of silence or gag orders.12 But in addition to issuing gag orders against parties, lawyers and witnesses, courts began issuing gag orders directly against the press itself. That such direct orders were mandated by the Sheppard decision is highly questionable but such orders were being used, citing Sheppard as precedent.

The issuance of a direct gag order against the press was the issue in the Nebraska case,13 the next major case in the modern interface of First and Sixth Amendment rights and the first head-on confrontation between the two. In holding the order invalid as an unconstitutional use of "prior restraint," the Court

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11Sheppard, 384 U.S., 361.


1396 S.Ct. 2791 (1976).
leaned away from concerns about due process and an increasingly powerful press toward a concern for First Amendment values. In this case, the Court employed a traditional balancing doctrine, rejecting absolute rules against prior restraints.

While the decision to overturn was unanimous, there was disagreement among the Justices as to justification and as to grounds. An analysis of this opinion and some speculation on the Court's decision-making process are instructive.

The Court's opinion, authored by Chief Justice Burger, refused to place an absolute ban on prior restraints in judicial contexts. Justice Brennan, as evidenced by his concurring opinion in which Justices Marshall and Stewart joined, wanted just such an absolute ban on all gag orders. Justices White and Stevens joined with Burger but, in their separate concurring opinions, both indicated that they were leaning toward the Brennan position by expressing doubts that an instance justifying prior restraint orders would ever exist. (There is evidence that there was a behind-the-scenes confrontation over the assignment of the opinion and that the Brennan concurrence was originally written as the opinion of the Court.\(^{14}\)) Despite its reluctance to

completely ban such orders, the Court did place an extremely high barrier against them, requiring the strictest scrutiny and presumption of invalidness.

Some commentators, nonetheless, have expressed discomfiture at the Court's refusal to establish an absolute ban and its continued use of a case-by-case balancing technique. The door was left open, according to some, for a future restriction on newsgathering activities.15 The Court would appear to be restating its rejection of the Black-Douglas absolutist position that the First Amendment means what it says without exception, a position which has enjoyed no support on this Court.16 Despite this, the Court has upheld First Amendment absolutes in such cases as Cox Broadcasting Corp. v. Cohn17 and in Miami Herald Publishing Co. v. Tornillo.18 An absolute ban on press


17 420 U.S. 469 (1975), (absolute ban against restrictions on publishing information from public court records).

18 418 U.S. 241 (1974), (absolute right for publishers to choose to refrain from publishing political replies).
gag orders would have provided predictability and security; failure to do so may result in trial judges attempting to employ them, resulting in costly and time consuming appellate procedures.19

However, it is difficult to see how such orders could pass the test established by the Nebraska opinion given Chief Justice Burger's stringent standards for allowing them. Standards prerequisite to an order would require that (1) pre-trial publicity is likely to reach the jurors, (2) alternative measures would not succeed and (3) a gag order would succeed in mitigating adverse publicity. In all likelihood, these requirements would be impossible to meet and the Court may, given the dicta in the concurring opinions, one day establish a per se ban on prior restraints in all but national security cases.20

The recognition of a categorical right of the press to report what occurs in open court left open the question of whether a court could simply close proceedings and, thus, limit access to the information.

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20While placing severe limitations on direct prior restraint orders against the press, the Court has left intact the use of silence orders against trial participants as sources of information.
The only significant case, prior to 1979, in which the Court had dealt with a secret judicial proceeding was *In re Oliver* in which the defendant had charged a violation of his due process rights. The Court had never had to rule on closed judicial proceedings in which the defendant had acquiesced in the closure and in which the judge had issued a direct order for closure. The Nebraska decision precipitated the issue by leaving the door open for trial judges to employ such a technique in attempting to insure fair trial in the face of active media interest.

**Right of Access Precedent**

The existence of a right of access has been discussed by the Court in several theoretical contexts prior to the Gannett and Richmond cases. Most basically, the Court has consistently recognized that the First Amendment protects a right of expression. Concomitantly, it has recognized a right to receive information available to it and to transmit a message.

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21 68 S.Ct. 499 (1948).

22 See New York Times Co. v. Sullivan 276 U.S. 354, (1964) 283, that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."

The cases at issue would add another context to the mix with an assertion of an affirmative right to gather information.

The most significant line of access precedent affecting Gannett and Richmond began in 1965 with Zemel v. Rusk in which the Court rejected a First Amendment argument and held that "the right to speak and publish does not carry with it the unrestrained right to gather information."24 This idea was expanded in Branzburg v. Hayes when the Court refused a reporter's claim to protection of confidential sources by advancing the principle that the press and public are equal in that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."25 But, the Court also said, somewhat contradictorily, that "newsgathering is not without its First Amendment protections...."26 While the Branzburg case was specifically directed to the issue of reporter's privilege rather than to the question of a public right of access to the institutions and processes of government, it clearly added to the debate over the existence of such

24 381 U.S. 1 (1965), 16.
25 408 U.S. 665 (1972), 684.
26 Branzburg, p. 707.
a right.27

In two related cases, Pell v. Procunier28 and Saxbe v. Washington Post Co.29 the issue of a First Amendment right of access emerged again. Both dealt specifically with access to prisoners and prison facilities and in both holdings the Court denied special press access, reasoning that restrictions placed on the press did not inhibit the press from scrutinizing public institutions. The Court re-emphasized its Branzburg statement that the press was entitled to no special privilege not available to the public at large, but in Pell the Court again noted that newsgathering had First Amendment protections.30

Then, in a case factually similar to the above, Houchins v. KQED, Inc.31 the Court was faced with a claim that a First Amendment right of access had been abridged. In denying the claim, the Court appeared to be following its Pell and Saxbe holdings, but the decision was far from clear. Only three Justices

30 Copple, p. 181-182.
31 438 U.S. 1 (1978)
found no First Amendment right to Government-controlled information or sources (Burger, White and Rehnquist). Stewart concurred on the narrow ground of the Pell and Saxbe refusal to give the press special privileges over the public, though he noted that practical distinctions might exist. The dissenters--Stevens, Powell and Brennan--noted that Pell and Saxbe had dealt with facilities where some access was already allowed, whereas Houchins presented an unfounded, arbitrary policy of concealment. Since Blackmun and Marshall did not participate, the significance of the Court's decision is problematic and the Court's position on a definitive right of access was unclear.

Analysis

As noted above, the Gannett case offered the Court the opportunity to address the question of access in a fair trial - free press context. In its decision, the Court refused to recognize a right of access to judicial proceedings in the Sixth Amendment, reserving the First Amendment question for the Richmond case in which the Court recognized a First Amendment right of access to criminal trials. A close scrutiny of that decision, in light of the precedential bases noted above, reveals that the Richmond case does not fit perfectly or neatly into either line of precedent. The closure of a court proceeding was neither specifically

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32 Houchins, p. 16.
prescribed by Sheppard nor specifically proscribed by Nebraska. Like Nebraska, the Richmond decision did rest on a First Amendment issue and prior restraints and court closures are somewhat analogous. Certainly the effects are the same since both are ex parte orders preventing or postponing publication. The press has argued that they are equivalent in that a closure order is indirect prior restraint and ought to be outlawed on the same basis. But there are fundamental differences between the two which such an argument misses. For one, gag orders are direct interference with the exercise of free expression and are prohibited because they directly prevent the publication of information already obtained. Closure orders prevent publication by preventing access. The difference here is more to method than to effect, but the scope is also different in that a prior restraint is variable and broader whereas closure is limited to a specific proceeding and a specific source. In addition, the press, under a gag order, could choose to violate the order and proceed to release information to the public. No such option exists where proceedings are closed plus the general public has no opportunity to scrutinize. The Nebraska case, therefore, recognized a press right to transmit

33Copple, p. 187.
information but not to gather it. The Richmond case was clearly not an extension of Nebraska but was instead a case breaking new ground.34

Therefore, the Court correctly characterized the case as one of access but was immediately confronted with its Gannett holding. Gannett had been cited by the Virginia Supreme Court in its upholding of closure; therefore, in order to recognize a right of access, the Court either had to overrule Gannett or restrict its applicability. It chose the latter course, allowing the Sixth Amendment analysis of no general right of access to stand and restricting the Gannett holding to pre-trial proceedings.

The Court then had to confront its previous treatment of a right of access in the First Amendment, particularly its refusal in Houchins to recognize a per se right of access to sources of information under government control. Court proceedings certainly fell within that framework. Clearly, from the dicta, the Court wanted to open trials to the public but was apparently reluctant to lift all restrictions on access across the board. It either had to overrule the entire package of access cases or find a way to limit a right of access specifically to opening trials and to do so in a way that was congruent with previous rulings.

The Court chose the latter option although how well it did so is problematic. One commentator sees no incongruence between the access cases and the Richmond issue, noting that in the previous cases the Court had not only never denied a right of access but also had never directly addressed the issue.35 Both Burger and Brennan, in their divergent approaches to finding a source, sought to reconcile the finding of a right of access with the previous cases. Justice Stevens, as noted supra and infra, found such efforts troublesome and largely unsuccessful.

Neither Burger nor Brennan received support from a majority of the Court for their two distinct theories in support of a right of access to the courtroom. Again, the Burger Court had handed down a decision in which the reasoning was cloudy and the impact uncertain.

The Chief Justice found support in an analysis of Anglo-American history, in the speech and press clauses and the right of assembly clause of the First Amendment, and in the Ninth Amendment. His historical analysis was a general statement of policy. His constitutional analysis rested on the First Amendment which he interprets as establishing a penumbra right of access based on the functional role played by

the speech, press and assembly clauses in the process of self-government. He extended the First Amendment protections for speakers and writers to include the right to listen by those receiving information. Burger attempted to reconcile Richmond with Pell, Saxbe and Houchins (and in so doing justified the limitations he placed on the reach of his judgment) by distinguishing the previous cases as dealing with institutions not characterized by a tradition of openness as contrasted to courts which are so characterized. This points to at least one difficulty with any employment of an historical analysis, for such an analysis does not allow for historical deviation from constitutional norms or ideals.

Burger encountered other difficulties. One commentator has scored the opinion as being technically flawed in that the cases cited to support his contention of a right of access based on the speech, press and assembly clauses were misinterpreted. The Chief Justice, in attempting to narrow his holding to criminal trials, also encountered some analytical difficulties and produced some inconsistent reasoning. He centered his analysis on the "therapeutic" value to society of scrutinizing the operation of the criminal justice system and on the "cathartic" value of the criminal trial in serving a function to society. He

36Lubben, p. 554.
thus announced the discovery of a new penumbral First Amendment right to protect these values. Therefore, he appeared to be promoting a theory that access is protected by the First Amendment where a tradition of openness exists because such openness promotes efficiency of governmental operation. Indeed, the Chief Justice offered: an interesting twist to First Amendment theory, one which sees the First Amendment as intending to promote good, efficient government rather than promoting the personal liberties of the people.37

Burger's Ninth Amendment analysis also suffers. The premise is a valid one, the Ninth Amendment having received a dearth of attention in the analysis of rights, but he failed to develop it logically. The point is that the Court has acknowledged that certain rights are implicit in enumerated rights and are, in fact, peripherally necessary to the full enjoyment and security of these specific rights.38 The problem is that, while he insisted that a right to attend criminal trials enhances the freedom of press and speech, he failed to show why making a transcript available would not serve the same purpose,


given his acknowledgement that people do not generally attend trials but rely on newspaper accounts for information.39 (Brennan could have incorporated the Ninth Amendment into his structural model more successfully.)

Justice Brennan's opinion differed from that of the Chief Justice on several significant points. In the first place, Brennan denied the discovery of a new constitutional right, asserting that the right always existed, but that the Court had simply never had opportunity to address it affirmatively. The problem here results from divergent approaches in dealing with the precedential right of access cases. Brennan interpreted them as holding out some restrictions on a right of access; Burger remembered his own flat denial of such a right in Houchins, forgetting that he was not supported by a majority of the Court.40 Whoever is right, the Court is likely to be plagued in the future by these earlier cases.

Another major point of divergence is the source of a right of access. Instead of finding it in a conglomeration of First Amendment protections of the rights of discussion, Brennan found an independent basis in the structural role played by the First Amendment. This model links the rights of communication

39Lubben, p. 555.

40See Stevens opinion in the Richmond case, pp. 2830-2831.
to the process of self-government, thus extending protection to whatever promotes full debate and discussion of governmental operations. Government is required, therefore, to open the courtroom to the scrutiny of the public. In line with his interpretation of the access precedents, Brennan was reluctant to make a right of access either unrestricted or unconditional and proposed a two-tiered test to determine where a right of access exists. The first tier was based on the historical question of whether or not a tradition of openness for a particular governmental institution or process exists, to which he added the question of whether or not access was important to its function. In the matter of criminal trials, both tiers of the test were met.

On the surface, given the weight which each gives to tradition plus the grounding in the First Amendment, it would appear that Burger and Brennan have simply arrived at the same point from two different philosophical directions. In actuality, the differences are substantial. In the first place, Brennan's First Amendment theory is more in line with the purposes of the First Amendment since the Amendment was designed not to protect the spectacle of what government does so much as it was designed to foster a citizenry affirmatively equipped for self-government. (One commentator has suggested that Brennan's structural model
has given new life to First Amendment doctrine and may help to revitalize such confused doctrines as that of "public forum" and will have implications beyond the courtroom issue.41) Burger's judgment was more restrictive and, as far as the broader implications are concerned, would appear to allow that those institutions which have been traditionally open can remain so whereas those which have been closed may possibly remain closed. Justice Brennan's model would allow a broader definition of a right of access which may reach to areas not previously subject to an assertion of a right of access.

In regard to the courtroom, it is clear that both believe that access must be contemporaneous. Delayed review of recordings or transcriptions were considered inadequate to serve and promote the purpose of public evaluation and control over the judicial system. Cold records do not faithfully reproduce the subtleties of bias or dishonesty. Also, the quality of discussion is highest when interest is highest and interest is highest with contemporaneous access.

Having clearly established constitutional bases for a right of access to the courtroom and having agreed that the right was not absolute, the Richmond decision falls short at the point of clearly establishing the parameters of application. As previously

noted, Brennan was particularly disturbed by the uncertainty of the standards for closure. The Court instructed the trial judge to tread softly, to provide justification for any closure order, and then failed to provide clear guidance for doing so. The trial judge knows only that the standard is less stringent than the Nebraska prior restraint test even though the practical effect of both gag and closure orders is the same. Out of this inconsistency, the trial judge is left to weigh the effects of any order, balance competing interests in favor of the "overriding" ones, and risk being the subject of the next case in which the Court may be willing to provide more definite standards and requirements.

In addition, the Court will ultimately have to address the application of its First Amendment analysis to pre-trial suppression hearings and perhaps to other pre-trial proceedings as well. A trial judge will certainly have to weigh the Richmond judgment against the Gannett judgment before closing such a proceeding. He or she might conclude that some justification may be required without having any basis for judging how much. A case in which the Richmond analysis is applied to suppression hearings may represent a more precise convergence of the fair trial - free press and right of access issues than existed in the Richmond case.
CONCLUSION

It has been said that the case history of the fair trial - free press issue has been long and tortuous. The interjection of the question of public access has not mitigated that condition. Beginning with Nebraska on one side and Pell and Saxbe on the other, the Burger Court shows signs of being badly splintered and unable not only to form a consensus but also to articulate one. These decisions are marked by pluralities: for example, the Nebraska decision had five opinions, the Gannett decision had five opinions, and the Richmond decision had seven separate opinions!

Archibald Cox has theorized\(^1\) that this Court is marked and marred by an unwillingness on the part of individual Justices to yield their personal preferences and by a desire by some to influence the future by providing separate analyses. The result is fragmentation and fractionalization which produces

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decisions which are lacking in clarity, consistency, and even practicality. This condition may be attributable to real differences so sharp as to be irreconcilable or it may be that several of the Justices are afflicted with philosophical rigidity and injudicious concern for personal prerogatives. Cox has suggested that the law clerk system in which clerks change annually has contributed to a lack of unity in philosophy and authorship. Woodward and Armstrong gave evidence of that in *The Brethren*, but the law clerk system is not peculiar to the Burger Court. What may be singularly characteristic of this Court is a tendency of some Justices to require law clerks to write in support of some preformed opinion. Given the semi-secret nature of Supreme Court deliberations, such observations are partially speculative but are not without support in any reading of the decisions and the noting of extra-judicial statements by the Justices themselves.

The Burger Court (and particularly the Chief Justice) shows a reluctance to deviate from a cautious, case-by-case approach to issues. In addition, there is evidence of a desire to employ some judicial restraint in confining decisions to the narrow issues. The paradox is that while doing so in relation to the

\[2\text{Cox, p. 72.}\]
judgments, the myriad opinion writing is characterized by a broad-swept engagement of multiple questions which result in opinions marked by ambiguity and more unanswered questions. As a consequence, the decisions are incoherent, fail to square with previous rulings in some instances, and fail to maintain "an evergrowing yet continuous body of law."³ If the pattern continues, not only is the Burger Court likely to suffer from diminished influence but the rule of law will suffer as well.

In summary, the Supreme Court of the United States has recognized an independent right of access for the public and press to trials in the First Amendment. It has denied the existence of such a right of access to pre-trial proceedings in the Sixth Amendment but has yet to address the question of access to pre-trial proceedings in the First Amendment. If and when it does so, it must consider the various kinds of pre-trial proceedings and differentiate them in congruence with its reasoning in the Richmond case.

The right of access to the courtroom is not considered absolute. Closure of courtrooms is still a possibility under certain circumstances, but the standards and requirements for keeping courts open or allowing their closure are unclear. (Though not at

³Cox, p. 25.
issue in this study, the Richmond decision also leaves open the question of how far beyond the courtroom this right of access may extend and how much access will fulfill the constitutional requirements for an informed, self-governing people.)

Multiple opinions, representing a divergence of rationale and theory, are the norm in both the fair trial—free press cases and the access cases. Clearly, the issues in these cases are difficult; First Amendment questions always produce differences of opinion and pointed debate. Nevertheless, these are crucial issues in a free society and the highest Court in the nation has an obligation to produce rulings that are definitive, firm, and understandable. In dealing with the issue of a public right of access to the courtroom, it has failed to do so.
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Born on April 13, 1941, in South Boston, Virginia, I am the only child of Ruth D. Dixon and the late Royster B. Dixon. I attended public schools in South Boston, graduating from Halifax County High School in 1959.

I studied at Westhampton College from September of 1959 to January of 1962 when I transferred to the College of William and Mary, graduating with an AB in history and government in 1963. Shortly thereafter, I married E.J. Bowen of Halifax, Virginia.

While my husband studied dentistry at the Medical College of Virginia, I taught history and government at John Randolph Tucker High School. Upon his graduation, we moved to Savannah, Georgia, where he began a tour of duty with the U.S. Army Dental Corps. While my husband served a tour in Vietnam, I returned to South Boston where I taught and served as guidance counselor at Mary Bethune High School.

We returned to Richmond in 1969 where my husband established a private dental practice. We have three children -- Sydney McKenna, born
in 1970; Charles Neville, born in 1973; and Anne Lindsay, born in 1974. Our family presently resides at 28 Maxwell Road, Richmond.

Since returning to Richmond, I have been active in civic and community affairs, serving on various charitable, religious, and community-action boards, committees, clubs, and guilds. I am presently a member of the Board of Directors of the Richmond Urban League.

My most intense involvement has been in the political sphere where I have worked in the Democratic Party for various campaigns. I have also been President of the Richmond Area Democratic Woman's Club, Vice President of the Virginia Federation of Democratic Women's Clubs, member of the State Central Committee of the Democratic Party of Virginia, member of the Third District Democratic Committee, and delegate to the 1980 Democratic National Convention. I am presently the Chairman of the Democratic Party in the city of Richmond and Third District coordinator for the Baliles for Attorney General campaign.

My family is active in River Road Church where I have been Superintendent of the Church School and member of the Board of Administration. In addition, I served for two years (1978-79) as ad interim Director of Education and administrative assistant to the pastor.