Cincinnati Gas & Electric Co. v. General Electric Co.: Extinguishing the Light on Summary Jury Trials*

I. Introduction

New innovations that help parties find equitable settlement of disputes save countless hours of litigation and countless dollars in legal fees and court costs. But with these innovations come problems never before considered in our judicial system.

In *Cincinnati Gas & Electric Co. v. General Electric Co.*,[1] the Sixth Circuit faced a particular problem that has arisen in connection with a seven-year-old innovation known as the summary jury trial. The court considered whether the summary jury trial, a technique designed to help parties settle disputes by means of a mock trial with an advisory jury, could be closed to the press and public under the first amendment.

Proponents of closure argue that no public right of access attaches to this proceeding since it produces only an advisory verdict that helps parties find a realistic settlement agreement.[2] Settlement procedures have traditionally been closed to all but the participants. The procedure has proven successful in simulating an actual trial through the use of a judge or magistrate, an actual courtroom, and a jury selected through a *voir dire* process.[3] But the very factors that make the technique so valuable a predictor of jury reaction justify a strong argument that the public should have access to the proceeding, as it does in virtually all civil and criminal proceedings.

This Note examines the conflict between the public right of access to judicial proceedings and the need for confidentiality in the summary jury trial. This Note begins with a description of the summary jury trial, exploring why it was developed and how it operates. Next, it traces the development of the right of access to judicial proceedings. After examining the Sixth Circuit's opinion denying a right of access and exploring the reasons supporting closure of summary jury trials, this Note will argue that the proceeding should carry a qualified right of access.

II. Description and Development of the Summary Jury Trial

In 1980, Federal District Court Judge Thomas D. Lambros was hearing cases he believed should have been settled without going through the time and expense of trial.[4] These cases had not settled, he felt, because the parties on both sides of each dispute believed they could obtain a better resolution from a jury than from their pretrial settlement negotiations.[5] He conceived the idea for a procedure that he hoped would break the impasse:

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* Prior to publication, on Feb. 21, 1989, the United States Supreme Court denied *certiorari* in this case *sub nom.* Cincinnati Post v. General Electric Co., 1989 U.S. LEXIS 620.

1. 854 F.2d 900 (6th Cir. 1988).
2. *Id.* at 904.
3. T. Lambros, The Summary Jury Trial 12–13 (1984).
4. *Id.* at iii.
5. *Id.*

> It occurred to me that if only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury *would* do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.[6]

The "crystal ball" Judge Lambros proposed was a procedure in which each party presents a capsulized version of its case to a jury that renders a nonbinding advisory opinion.[7] Lengthy evidentiary battles, motions, and the examination of witnesses are all avoided. The proceeding usually lasts one-half to two days.[8] Yet each side has the chance to see how its case appears to a jury. Judge Lambros reports from his experience with the technique that "[u]nreasonable demands and offers are re-evaluated, and mutually agreeable compromises are worked out in light of the jury's findings."[9]

The procedure of a summary jury trial is similar in many ways to a normal trial. Each side must present a trial brief and a set of proposed jury instructions.[10] Six jurors are selected in an abbreviated *voir dire* examination.[11] Only evidence that would be admissible at trial may be submitted to the advisory jury.[12] In addition, the parties to a dispute may choose to stipulate that the jury finding will be a final determination on the merits, so that the summary jury trial is the sole proceeding that decides the case.[13]

However, the proceeding was designed as a settlement technique, not a substitute or low-cost alternative to trial.[14] The authority relied on by federal courts to conduct a summary jury trial is Federal Rule of Civil Procedure 16, dealing with pretrial conferences and management, and the court's inherent power to manage its cases.[15] In most cases, the summary jury technique is used only when other means of settlement have failed and almost always as a means of bringing about a settlement prior to trial.[16]

III. Development of the Right of Access to Judicial Proceedings

A. *Right of Access to Criminal Proceedings*

Controversy over closure of court proceedings is a relatively recent phenomenon. One of the few older cases dealing with closure was *In re Oliver*,[17] a 1948 case in which the United States Supreme Court overturned a criminal contempt conviction in part because the judge convicted the defendant in a secret session. Perhaps the

6. *Id.* (emphasis in original).
7. *Id.* at 9.
8. *Id.* at 10, 13–14.
9. *Id.* at 10.
10. *Id.* at 13.
11. *Id.*
12. *Id.* at 14.
13. *Id.* at 15.
14. *Id.* at 8.
15. *Id.* at 10–11.
16. *Id.* at 9–10.
17. 333 U.S. 257 (1948).

major motivation behind recent attempts to close proceedings or restrain press coverage of them is the avoidance of "unfair and prejudicial news comment on pending trials" in the wake of *Sheppard v. Maxwell*.[18] In that case, the Court ordered a new trial for a man convicted of murder because the judge had failed to keep the trial process free from prejudicial publicity and disruptive influences.[19] The Court in *Sheppard* warned trial courts to "take strong measures" to ensure "that the accused receive a trial by an impartial jury free from outside influences."[20] The proceedings could be properly insulated, the Court said, by continuing the case, transferring it to another location, or sequestering the jury.[21]

Attempts to prevent prejudicial publicity by means of prior restraint of the media[22] or closure of the proceeding[23] have generally been rejected by the Court. An exception was *Gannett v. DePasquale*,[24] in which the Court relied on the sixth amendment to deny a news organization access to a pretrial hearing on the suppression of allegedly involuntary confessions.

The Court first recognized a first amendment right of public access to criminal trials in the landmark case of *Richmond Newspapers v. Virginia*.[25] The case considered the constitutionality of a trial judge's order closing the courtroom to all witnesses except during their testimony.[26] Defense counsel had requested the order with no objection from the prosecutor.[27] The trial judge denied a motion by Richmond Newspapers, Inc. to allow its reporters to attend the trial, citing concern that publicity about the trial could infringe upon the due process rights of the defendant.[28] On appeal, the Supreme Court ruled that a criminal trial must be open to the public "[a]bsent an overriding interest articulated in findings" by the trial court.[29] Chief Justice Burger, writing for a plurality, ruled that "the right to attend criminal trials is implicit in the guarantees of the first amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"[30] The first amendment, Chief Justice Burger wrote, prohibits government "from limiting the stock of information from which members of the public may draw."[31] He repeated a concept from earlier first amendment cases that "[f]ree speech carries with it some freedom to listen."[32]

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18. 384 U.S. 333 (1966).
19. *Id.* at 358.
20. *Id.* at 362.
21. *Id.* at 363.
22. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
23. *See infra* notes 39–97 and accompanying text.
24. 443 U.S. 368 (1979).
25. 448 U.S. 555 (1980).
26. *Id.* at 560.
27. *Id.*
28. *Id.* at 561.
29. *Id.* at 581.
30. *Id.* at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
31. *Id.* at 576 (quoting First Nat'l Bank of Boston v. Bellotti, 439 U.S. 765, 783 (1978)).
32. *Id. See also* Kliendienst v. Mandel, 408 U.S. 753 (1971); Stanley v. Georgia, 394 U.S. 557 (1969); Martin v. City of Struthers, 319 U.S. 141 (1943).

Chief Justice Burger traced the historical development of the public trial to demonstrate its significance in the American judicial system.

> In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. . . . Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment.[33]

The requirement of compulsory attendance was eventually dropped and juries were selected to serve as proxies for the rest of the community.[34] But the open nature of trials remained "one of the essential qualities of a court of justice."[35] Courts in colonial America continued the English tradition of public trials, sometimes explicitly recognizing the openness of trials as part of the written law of the colony.[36]

The practice of holding open trials has continued throughout the history of this country, Chief Justice Burger wrote, not out of mere blind adherence to tradition, but because publicity itself plays an important role in ensuring the fairness of trials and the administration of justice.[37] He outlined several reasons why public trials have become an indispensable part of our justice system. First, public access improves the quality of the proceeding by encouraging all participants to conduct themselves fairly and conscientiously.[38] The fact that a witness's testimony will be heard by many people and reported to others discourages perjury.[39] Public observance of the fact finder guards against "decisions based on secret bias or partiality."[40]

Second, a public trial has a cathartic effect on the community. "When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."[41] Watching the justice system run its course satisfies a natural desire to see justice done.

Third, openness engenders public confidence in the justice system and educates the public about the way it operates. "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."[42]

Justice Brennan wrote a separate concurrence to explain his view that trials are presumptively open because the first amendment "has a *structural* role to play in securing and fostering our republican system of self-government."[43] Public access to government proceedings furthers public debate on important issues and helps

33. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980) (citation omitted).
34. *Id.* at 565, 572.
35. *Id.* at 567 (quoting Daubney v. Cooper, 109 Eng. Rep. 438, 440 (K.B. 1829)).
36. *Id.* at 567–68.
37. *Id.* at 569.
38. *Id.*
39. *Id.* at 569–70.
40. *Id.* at 569.
41. *Id.* at 571 (citations omitted).
42. *Id.* at 572 (quoting J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 438 (J. Chadbourn rev. ed. 1976)).
43. *Id.* at 587 (emphasis in original).

members of the public become better informed about those issues.[44] The citizenry is thus in a better position to govern itself. However, Justice Brennan said, "[a]nalysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."[45]

In exploring whether public access is important to the judicial proceeding, Justice Brennan reiterated the Chief Justice's discussion of the "nation's historic distrust of secret proceedings," the administration of justice, and the interest in maintaining public confidence.[46] In addition, Justice Brennan noted that the judiciary, as one of the three branches of government, has enormous impact upon the lawmaking process.[47] As a result, the value of what transpires in a judicial proceeding extends beyond the individual case.[48] He observed that the Court has repeatedly upheld "the right to report about the administration of justice."[49] For these reasons, Justice Brennan found that "public access is an indispensable element of the trial process," assuming structural importance in our system of government.[50]

Two years later in *Globe Newspapers v. Superior Court*,[51] the Court went beyond the "overriding interest" rule given in *Richmond Newspapers* to an even higher standard supporting public access to criminal trials. Access could only be denied, the Court held, when it is "shown that the denial is necessitated by a compelling governmental interest."[52] The opinion of the Court, written by Justice Brennan, adopted the rationale of his *Richmond Newspapers* concurrence that the first amendment presumption of access is based both on a tradition that "implies the favorable judgment of history"[53] and on the benefit that public access confers upon the judicial system.

Since *Globe Newspapers*, the Court has ruled in favor of public access to preliminary suppression hearings,[54] *voir dire* proceedings,[55] and other preliminary hearings.[56] The latest expression of the Court's standards for denying public access came in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*),[57] in which the Court considered the constitutionality of an order excluding the press and public from

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44. *Id.*

45. *Id.* at 589.

46. *Id.* at 589–97.

47. *Id.* at 595.

48. *Id.*

49. *Id.* at 592. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

50. *Richmond Newspapers*, 448 U.S. at 597.

51. 457 U.S. 596 (1982).

52. *Id.* at 606–07.

53. *Id.* at 605–06.

54. *See, e.g.*, Waller v. Georgia, 467 U.S. 39 (1984). However, it should be noted that openness in this case was justified on a sixth amendment right to a public trial, rather than a first amendment right. Nevertheless, the Court relied on the test articulated in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) to find that a party seeking to close a hearing must show an overriding interest.

55. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

56. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

57. 478 U.S. 1 (1986).

a pretrial criminal proceeding and prohibiting release of the transcript from the proceeding.

The Court in *Press-Enterprise II* recognized that labeling a judicial proceeding as part of a "trial" is inadequate to explain why the event should be open to the public.[58] The Court added to its analysis a two-step inquiry based on *Globe Newspapers* to help decide whether a particular proceeding is the type that is presumptively open. First, has "the place and process . . . historically been open to the press and public?"[59] Second, does public access play "a significant role in the functioning of the particular process in question?"[60] If both of these "tests of experience and logic" are met, then this is the type of proceeding that is presumptively open to the public.[61] Once this presumption is established, it may only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[62]

B. *Right of Access to Civil Proceedings*

Before considering how these precedents might affect the issue of summary jury trial closure, it will be useful to consider whether the presumption of openness extends to civil proceedings. Although the United States Supreme Court has never specifically ruled on this point, lower courts have used the Court's reasoning and dicta to find a presumption of public access to civil trials and court documents.[63] The Court addressed this question briefly in *Richmond Newspapers* with its statement that "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."[64]

The trend among lower courts is to rely on *Richmond Newspapers* and its progeny to find a presumption of public access in civil cases.[65] Representative of this trend is *Brown & Williamson Tobacco Corp. v. F.T.C.*,[66] which involved a dispute between a tobacco company and the Federal Trade Commission over the accuracy of the Commission's testing of "tar" levels in Barclay cigarettes.[67] A consumer organization engaging in health research filed a brief to urge that the Sixth Circuit lift the lower court's seal on all the documents filed by the F.T.C.[68] In its decision, the Sixth Circuit reviewed the Supreme Court's holdings on access to criminal trials and concluded that the Court's rationales supported access to civil proceedings:

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58. *Id.* at 7.
59. *Id.*
60. *Id.*
61. *Id.* at 9.
62. *Id.* at 9–10 (quoting Press-Enterprise I, 464 U.S. 501, 510 (1984)).
63. *See infra* notes 80–97 and accompanying text. *See also* Note, *Public Access to Civil Court Records*, 39 VAND. L. REV. 1465 (1986). *See generally* Note, *After* Richmond Newspapers*: A Public Right to Attend Civil Trials?*, 4 COMM/ENT 291 (1982).
64. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980).
65. *See supra* note 63.
66. 710 F.2d 1165 (6th Cir. 1983).
67. *Id.* at 1168.
68. *Id.* at 1169.

> The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.
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> The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.
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> Finally, the fact-finding considerations relied upon by Justice Brennan obviously apply to civil cases. Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceeding.[69]

The court noted that the right of access does have its limits. Courts have restricted access to judicial proceedings to maintain order and decorum in the courtroom[70] and to protect against the disclosure of certain types of information.[71] The latter type of limitation—content-based restrictions—has been used in some instances to protect a defendant's right to a fair trial, preserve a party's right of privacy, or to guard against disclosure of national security or trade secrets.[72] The court found that the tobacco company had not shown a competing interest sufficient to justify an exception to the right of access.[73] "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."[74]

In *Wilson v. American Motors Corp.*,[75] the Eleventh Circuit dealt with issues of special significance to the question of closing a summary jury trial, a proceeding designed primarily as a settlement technique. The court considered whether a district court had properly denied a request to unseal the judicial records of a prior case that had settled out of court.[76] In the prior case, a wrongful death action arising out of a jeep accident, American Motors negotiated a seal upon the record as part of the settlement agreement.[77] The prior case was settled "with the 'encouragement and assistance' of the trial judge" after a jury responded to special interrogatories.[78] The appellant in the instant case sought the records to invoke offensive collateral estoppel against American Motors in another wrongful death suit.[79]

The court declined to follow the Sixth Circuit's standard that virtually the only

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69. *Id.* at 1179.

70. *Id. See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970); Sheppard v. Maxwell, 384 U.S. 333 (1966).

71. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983). *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978).

72. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

73. *Id.*

74. *Id.*

75. 759 F.2d 1568 (11th Cir. 1985).

76. *Id.* at 1569.

77. *Id.*

78. *Id.*

79. *Id.*

interests sufficient to justify closure are a right of privacy, a defendant's right to a fair trial, trade secrets, and national security.[80] Instead, the court adopted a standard based on *Globe Newspapers* set forth in an earlier case dealing with the openness of civil trials:

> We do not hold that every hearing, deposition, conference or even trial in a case of this kind must be open to the public. We do hold that "where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."[81]

The court found that "the interest in preserving the authority of the court in assisting in settlement agreements does not override the presumption of openness in civil proceedings."[82] The interests of the public must be given great weight because access helps ensure the "integrity of the system" and allows the public to understand the significant issues dealt with in civil litigation.[83]

IV. Denying the Right of Access to Summary Jury Trials—The *General Electric* Case

Should the right of access to judicial proceedings developed by the Supreme Court in the criminal context, and applied by most circuits in the civil context, extend to the summary jury trial? This is the central question raised by *Cincinnati Gas & Electric Co. v. General Electric Co.*[84]

A. *Background*

The case involved a suit brought in federal district court by the owners of a failed nuclear power project against General Electric Co. (GE), alleging that GE covered up flaws in a nuclear reactor system it sold to the owners of the project.[85] Plaintiffs alleged $360 million in damages as a result of the reactor's flaws.[86]

The alleged flaws in the reactor system were but one part of a highly publicized debacle involving the Zimmer nuclear power project. Cost overruns, charges of corruption in the construction and inspection of the plant, and problems in the reactor all contributed to the eventual abandonment of the site as a nuclear power plant.[87] The Public Utilities Commission of Ohio, citing negligence and mismanagement on the part of the three utilities that owned the project, denied those utilities the right to pass the project losses on to consumers.[88] The heightened interest of the public in the

80. *Id.* at 1570–71.
81. *Id.* at 1571 (quoting Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983)).
82. *Id.*
83. *Id.*
84. 854 F.2d 900 (6th Cir. 1988).
85. Columbus Dispatch, Sept. 16, 1987, at 7E, col. 2.
86. *Id.*
87. Grieves, *A $1.6 Billion Nuclear Fiasco*, Time, Oct. 31, 1983, at 96.
88. 71 P.U.R.4th 140, 153 (1985).

Zimmer project prompted several newspapers that had covered the project to intervene in the lawsuit to contest a June 1987 closure order.[89]

Judge S. Arthur Spiegel denied the newspapers' motion, but ordered that a transcript be made of the summary jury trial to preserve the substance of the proceeding in case his decision was overturned on appeal.[90] Judge Spiegel cited "General Electric's concerns regarding this procedure" as the reason for the closure order.[91] A protective order negotiated by the parties and approved by the magistrate protected much of the material that would be produced in discovery.[92]

B. *Sixth Circuit's Decision and Rationale*

In upholding the closure order, the Sixth Circuit relied on the test articulated by the Supreme Court in *Press-Enterprise II*.[93] The court addressed the first prong of that test—whether there has been a "tradition of accessibility"—by agreeing with Judge Spiegel that "there is no historically recognized right of access to summary jury trials in that this mechanism has been in existence for less than a decade."[94] The court rejected the suggestion of the appellants that the mechanism's similarity to a trial required a finding of traditional access, ruling instead that the mechanism is a settlement technique historically closed to the press and public:

> At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference. It is important to note that the summary jury trial does not present any matter for adjudication by the court. Thus, we find appellants' argument to be unpersuasive and therefore hold that the "tradition of accessibility" element has not been met.[95]

The court also found that the second prong of the *Press-Enterprise II* test—whether access plays a significant positive role in the functioning of the particular process in question—had not been met.[96] Public access, the court believed, would actually be detrimental to a process in which one of the parties has concerns about confidentiality, and would diminish the technique's effectiveness as a settlement device.[97] "Therefore, allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a 'significant positive role in the functioning of the particular process in question.'"[98] The court decided that because the *Press-Enterprise II* test had not been met, no right of access attached to the summary jury trial proceeding.[99]

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89. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 598 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988).

90. *Id.*

91. *Id.* at 600.

92. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 901 (6th Cir. 1988).

93. *Id.* at 903–05.

94. *Id.* at 903 (quoting Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 598, 599 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988)).

95. *Id.* at 904.

96. *Id.*

97. *Id.*

98. *Id.* (quoting Press-Enterprise II, 478 U.S. 1, 8 (1986)).

99. *Id.* at 905.

As previously noted, the ambiguity over whether a summary jury trial falls under the "trial" category or the "settlement" category is one of the key issues in deciding the question of access. The Sixth Circuit resolved this issue by drawing a distinction based on whether a court is exercising its "coercive powers."[100] The court explained that *Press-Enterprise II* involved a judicial proceeding that "resulted in a binding judicial determination which directly affected the rights of the parties."[101] But the summary jury trial, like a settlement negotiation or status conference, usually presents no issue for final and binding adjudication.[102] "Thus, it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right of access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation."[103] This distinction gave further support to the court's conclusion that public access is unnecessary at a summary jury trial.

Judge Edwards concurred with the court's ruling that the summary jury trial could properly be conducted without public access, but argued that the transcript should be released once the dispute has settled.[104] "I recognize that the view expressed above might impede some settlements, but I cannot reconcile complete suppression of this record with the First Amendment which our forefathers placed as the first condition for the founding of our nation."[105]

C. *Other Considerations Supporting Closure*

In many ways, the case for protecting a summary jury trial from public scrutiny is compelling. When a judge is considering holding a summary jury trial, it is generally because she feels the parties cannot settle the case due to differences over an appropriate settlement amount, or over the way the case will be seen by a jury. The summary jury trial offers an effective method of overcoming this deadlock by showing the parties how a jury views the case without subjecting either side to the risk of a binding defeat.

If a party refuses to participate in the summary jury trial out of concern that public disclosure of some matters might be harmful or embarrassing, and the judge cannot hold the proceedings in private, a promising means of settling the case is lost. The case then proceeds to further negotiations or, more likely, to a full-length trial at great cost to the public.

Choosing between the competing interests of ensuring public access to judicial proceedings and encouraging settlement of cases, the Sixth Circuit settled the matter by declaring that the summary jury trial should properly be considered a form of settlement negotiation for the purposes of public access.[106] As the court points out,

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100. *Id.*

101. *Id.*

102. Although the parties may stipulate that the finding of the jury will be binding, the parties in the *General Electric* case chose not to do that. *Id.*

103. *Id.*

104. *Id.* (Edwards, J., concurring).

105. *Id.* (Edwards, J., concurring).

106. *Id.*

the technique differs from a normal trial in many ways. Rather than binding the parties as a trial on the merits, the technique leads only to an advisory opinion that helps the parties evaluate their respective settlement positions.[107] Courts find authority for conducting this procedure under the judicial rule of pretrial management.[108] The procedure is conducted only with the cooperation of both parties.[109] The proceeding is short compared to a full trial, with no live testimony, no cross-examination, and no formal introduction of evidence.[110] Finally, if the parties fail to settle, the outcome of the summary jury trial has no bearing on the merits or ultimate outcome of the case.[111]

Seen this way, the summary jury trial is akin to a settlement negotiation or the discovery process—both of which enjoy special protection from disclosure. On the matter of discovery, the Supreme Court has spoken clearly in *Seattle Times Co. v. Rhinehart*.[112] Ruling that a litigant newspaper had no constitutional right to publish information learned during discovery, the Court held that pretrial proceedings are not a traditionally public source of information.[113] When a protective order limiting dissemination of material learned in pretrial proceedings "furthers a substantial government interest unrelated to the suppression of expression," the order does not violate the first amendment.[114] Such an order furthers the government interest in encouraging settlement of lawsuits.

Indeed, the state interest in promoting settlement is the chief policy reason supporting closure of the summary jury trial. Full litigation of an issue in court can be extremely expensive for the parties to the dispute and for the public treasury.[115] The number of cases pending before American courts continues to increase.[116] The resulting backlog leads to delays in the justice system for all participants. These problems can be reduced when parties agree to settle their cases out of court.[117] To the extent public access to a summary jury trial serves as an impediment to the settlement process, it works against efforts to alleviate a backlogged justice system.

Public access may work against the summary jury trial process in a number of ways. The process depends on a certain degree of candor and informality from the

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107. *See* T. LAMBROS, *supra* note 3, at 9.

108. *Id.* at 10–11.

109. *Id.* at 10.

110. *Id.* at 10, 13–14.

111. *Id.* at 10.

112. 467 U.S. 20 (1984).

113. *Id.* at 33.

114. *Id.* at 34, 37.

115. J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE 1150–51 (1985).

116. At the federal level, for example, William H. Rehnquist, Chief Justice of the United States Supreme Court reports:

> During 1987, the federal judiciary at every level disposed of cases at or near record levels. The Supreme Court acted upon 4,340 cases; the courts of appeals 36,010 cases; the district courts 238,000 civil and 41,087 criminal cases. In addition, bankruptcy judges and magistrates disposed of a large volume of cases and contested matters, many of which would have otherwise required the attention of a district judge. But, despite the determined efforts of everyone associated with the federal judiciary, both new filings and pending cases continue at high and in some instances record levels.
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> Unfortunately, there is a good likelihood that our workload will become even heavier.

REHNQUIST, 1987 YEAR-END REPORT ON THE JUDICIARY 4 (1987).

117. *See generally* Sander, *Varieties of Dispute Process*, 70 F.R.D. 111 (1976).

participants.[118] Public scrutiny may discourage parties from being candid and forthright about their evidence without the usual procedural safeguards found in a normal trial. A lack of confidentiality in the proceeding may destroy the atmosphere vital to the success of the summary jury trial, or discourage parties from participating at all.[119] Thus, reflexively labeling the technique as a judicial proceeding presumptively open to the public may limit the usefulness of an innovative technique designed to help parties settle their cases and reduce overcrowded dockets.

In addition, public access may add little value to the summary jury trial. A jury made up of citizens from the community observes the process, thereby providing the element of public scrutiny that the Supreme Court has deemed so vital to maintaining the integrity of the justice system.[120] And while some argue that the public will miss the opportunity to hear the issues involved in the case if the proceeding is closed,[121] others point out that this always happens when parties settle their disputes out of court.[122]

V. Recommended Analysis

A. *Settlement Negotiations or Trial?*

Given these compelling reasons, is the Sixth Circuit correct in declaring the summary jury trial closed to the public as merely an innovative form of settlement negotiations? Or does the summary jury trial carry so many attributes of a normal trial that it should be open to the public in the way trials historically have been?

The four Ohio newspapers that intervened to contest the closure order argued that a summary jury trial bears too much resemblance to a trial to be considered simply another settlement technique.[123] For example, a judge paid from tax dollars presides over the proceeding, and a jury of citizens listens to the case and renders a verdict.[124] In addition, the proceeding serves as a forum for discussion of legal issues and, in this case, matters of paramount public concern.[125] The newspapers contrasted the summary jury trial with the typical settlement conference to show that the proceeding has more in common with a regular trial.[126] They also noted that the proceeding occurred after the final pretrial conference with the judge.[127] For these reasons, they argued, a summary jury trial is essentially a trial procedure, and such procedures have historically been open to the press and public.[128]

The *General Electric* court articulated a number of reasons why the summary

118. Rieders, *Summary Jury Trials*, 23 Trial 93, 93–94 (1987).
119. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).
120. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 602 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988).
121. *Id.* at 601.
122. *Id.*
123. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 902 (6th Cir. 1988).
124. *See* T. Lambros, *supra* note 3, at 13.
125. *General Electric*, 117 F.R.D. at 600.
126. *Id.* at 601.
127. *Id.* at 601–02.
128. *Id.* at 600.

jury trial should be considered a settlement proceeding. These reasons centered primarily on the purpose for which the summary jury trial exists.[129] One of the main arguments was that the first amendment mandates public access only when a court exercises "coercive powers."[130] While this argument makes a rational distinction between the summary jury proceeding and a normal trial, it does little to explain why public access is unnecessary at a proceeding that bears some resemblance to trial and usually has enormous impact on settlement negotiations. The mere fact that a court has made no binding adjudication is not a sufficient reason to remove the entire proceeding from public view. For example, in *Wilson*, the Eleventh Circuit upheld the right of access to affidavits, depositions, trial transcripts, and other records of a case that had settled before a binding decision had been made.[131]

The court never explains why the use of coercive powers, and not some other factor, should be decisive in resolving the question of public access. Like other arguments for declaring that the summary jury trial is nothing more than settlement negotiations, the "coercive powers" argument amounts to mere labeling.

Simply labeling the summary jury trial either a settlement proceeding or a trial proves to be of little help in resolving the question of access. The Supreme Court recognized in *Press-Enterprise II* that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.* 'trial' or otherwise, particularly where the preliminary hearing functions much like a full scale trial."[132] As Judge Edwards pointed out in *General Electric*, the summary jury trial "resemble[s] both settlement negotiations and a bench trial."[133] Its ambiguous nature makes it inappropriate to categorize the technique without explaining fully why it should be judged by one standard and not another.

The Supreme Court began to encounter this difficulty in a number of cases following *Richmond Newspapers*.[134] Other courts were unsure whether such proceedings as *voir dire*, a suppression hearing, or a preliminary hearing had a history of openness and were presumptively open to the public.[135] The Court responded by requiring in its analysis not only the question of whether the process had been historically open, but also "whether public access plays a significant positive role in the functioning of the particular process in question."[136] By requiring that a proceeding must pass the tests of both "experience and logic" before any right of access would attach,[137] the Court demanded an inquiry into the nature of the proceeding to identify specifically whether access would serve a helpful purpose in the proceeding.

Such an inquiry, using the Supreme Court's *Press-Enterprise II* analysis, is the

129. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988).
130. *Id.* at 905.
131. Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985).
132. Press-Enterprise II, 478 U.S. 1, 7 (1986).
133. *General Electric*, 854 F.2d at 905 (Edwards, J., concurring).
134. *See supra* notes 54–56 and accompanying text.
135. *See supra* notes 54–56 and accompanying text.
136. *Press-Enterprise II*, 478 U.S. at 8.
137. *Id.* at 9.

best way to resolve the question of how to treat the ambiguous summary jury trial. A *Press-Enterprise II* analysis that closely follows the Supreme Court's reasoning in public access cases will demonstrate why summary jury trials should be presumptively open to the press and public.

B. Press-Enterprise II *Analysis*

1. *History of Access*

In finding that the summary jury trial procedure failed the "history of access" prong, the Sixth Circuit made the argument that the procedure was designed as a settlement technique and that settlement negotiations are traditionally closed procedures.[138] But since the summary jury trial has characteristics of both pretrial settlement procedures and a full trial, the assumption that it falls into the category of settlement seems an inappropriate way to settle the "history of access" question.

While the court is correct that the summary jury trial was originally designed as a settlement technique, the way it operates has in many ways overstepped the boundaries of settlement negotiations. The procedure intentionally adopts many of the attributes of a full civil trial to make the procedures more realistic. With those realistic qualities comes the reality that, in the long run, the integrity and fairness of the proceeding depends in part on public access and scrutiny.

The other historical argument was that the summary jury trial has been a closed procedure for its entire, though short, history.[139] This argument entirely lacks merit. It is a surprising result that judges could invent and begin using a new procedure, declare it closed to the public from the beginning, and upon challenge to the closed proceeding respond that closure is appropriate because "it has always been this way." Perhaps the best that can be said on the matter of history is that the summary jury trial shares many of the characteristics of an actual trial, but no conclusive answer exists about whether tradition mandates an open or closed proceeding.

Another factor of note is the Supreme Court's broad language in applying the *Press-Enterprise II* test to judicial "proceedings."[140] In the lower court, Judge Spiegel argued that the right of access does not apply to a summary jury trial because it is not a full "trial."[141] The Court's language indicates that the standard applies not just to trials, but to all "proceedings."

2. *Access Plays a Significant Positive Role*

The crucial test is the second prong of the *Press-Enterprise II* test, which was added by the Court precisely to deal with the problem of proceedings to which access could not be adequately resolved on the basis of history. This prong requires an

138. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988).

139. *Id.* at 903.

140. *Press-Enterprise II*, 478 U.S. at 7.

141. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 600–02 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988).

inquiry into whether access will play a significant positive role in the proceeding.[142] The Sixth Circuit's argument for closure was that since access to the summary jury trial would hinder the state interest in promoting settlement, it is therefore not the type of proceeding for which public access would play a significant positive role.[143] This argument misconstrues the Supreme Court's formulation of this test.

The Court has explained the second prong of the test by contrasting most government procedures with those for which access would totally frustrate the purpose.[144] Examples of the latter category could include a grand jury proceeding[145] and a high-level national security meeting.[146] Into this category fall those proceedings that by their very nature demand secrecy. The summary jury trial is not the type of proceeding that by its very nature *must* be kept secret in all cases. Thus, it should fall into the first category—that of the normal government proceeding.

In considering whether a proceeding meets the second prong—that access plays a significant positive role—the Court has always explored whether the proceeding would benefit from public access and whether the public would benefit from access to the proceeding.[147] While it is possible that secrecy would encourage some parties to engage in summary jury trials and might allow for a more candid atmosphere, secrecy plays no vital role in the proceeding the way it does for a grand jury. On the contrary, the summary jury trial could benefit from openness the way most judicial proceedings do. It would promote "true and accurate fact finding"[148] in a proceeding that could have great impact on the outcome of many disputes. It would help maintain fairness and impartiality among the judges who preside over the proceedings and the juries that decide them. Counsel for both sides would be less likely to misrepresent or exaggerate the evidence because of the increased possibility of contradiction. Witnesses or others with pertinent information may hear of the dispute and come forward to offer it. Contrary to the assertion of Judge Spiegel,[149] the presence of a small jury would clearly be inadequate for this purpose.

In many cases, discussion of the issues in public would serve the public interest. The *General Electric* case provides a clear example of a summary jury trial that deals with matters of vital concern to the public. A discussion of charges that a well-known company delivered a flawed reactor system to be used in a nuclear power plant could shed new light on the controversial topic of nuclear power. Even Judge Spiegel, while feeling constrained for other reasons to uphold the closure order, agreed with the newspapers that openness would serve the public interest:

> We are in complete agreement with movants that the issues central to the merits of this case present matters of paramount public concern. And, as an aside, we note that were the

142. *Press-Enterprise II*, 478 U.S. at 8.

143. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 904 (6th Cir. 1988).

144. *Press-Enterprise II*, 478 U.S. at 9.

145. *Id.*

146. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.24 (1980) (Brennan, J., concurring).

147. *See, e.g., Press-Enterprise II*, 478 U.S. at 10–13.

148. Globe Newspapers v. Superior Court, 457 U.S. 596 (1982).

149. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 602 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988)..

> matter one purely within the Court's discretion, we would advocate opening the procedure to the press and public, in the belief that all parties, as well as the public, would be well-served by an airing of the issues.[150]

Finally, it should be noted that the use of the summary jury trial and other forms of alternative dispute resolution continues to grow.[151] These techniques for settling disputes work well in some situations and avoid much of the time, expense, and risk of trial.[152] A continued increase in the use of summary jury trials would mean that an ever larger percentage of cases would be resolved this way, rather than through trials. Courts will have to consider whether it is desirable for a whole field of judicial proceedings to be off limits to public view. Although the closure of summary jury trials may have little impact on the integrity of the court system now, while the number of such proceedings is few, closure of a significant portion of judicial proceedings in the future would likely have a negative impact on the system.

C. *Summary Jury Trials Should Carry a Qualified Right of Access*

Under the Sixth Circuit's reasoning in *General Electric*, the summary jury trial carries no presumption of access at all.[153] The court decided that no greater right of access attaches to the summary jury trial than attaches to a settlement conference held in a private law office.[154] It follows that even if neither party has any reason to want protection from public scrutiny, the proceeding may still be closed to the press and public even though it is held in a public courtroom, presided over by a judge working for the government, and viewed by an empaneled jury paid with tax dollars. The Sixth Circuit's protection of the summary jury trial, though done for the best of reasons, clearly goes too far.

For the reasons stated earlier, the summary jury trial procedure should be declared presumptively open to public scrutiny. However, as the Supreme Court has recognized repeatedly, the right of access to judicial proceedings is not absolute.[155] Valid reasons may exist to close summary jury trials to public scrutiny in certain cases. If so, the Court has provided the appropriate standard:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[156]

In *General Electric*, the Sixth Circuit should have recognized the presumptive openness of the summary jury trial and then used the above standard to decide if the protection of GE's "concerns" was an interest of sufficient magnitude to overcome

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150. *Id.* at 600.

151. *See* Lambros, *The Alternative Movement: Rekindling America's Creative Spirit*, 1 OHIO ST. J. DIS. RES. 3 (1985).

152. *Id.*

153. Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903 (6th Cir. 1988).

154. *Id.*

155. Press-Enterprise II, 478 U.S. 1, 9 (1986).

156. *Id.* at 9.

the many reasons for openness. There is no way to know from these judicial opinions just what GE's concerns were. But if they amounted merely to a concern for protecting GE from some embarrassment, this should not be enough to overcome the presumption of access, as the Sixth Circuit has previously ruled.[157]

VI. Conclusion

Although there are a number of reasons for allowing summary jury trials to be closed to the public, the value of public access demands that the procedure be presumptively open to the press and public, as are most criminal and civil proceedings. Were a party to point out special circumstances and move for closure, a court could close the proceeding, but only in an extraordinary case. The moving party would need to show an "overriding interest" such that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[158] This approach is consistent with the Supreme Court's reasoning in cases dealing with access to judicial proceedings.

While public access may limit the use of the summary jury trial to some extent, forcing parties to settle the dispute another way or go to trial, that situation is preferable to shutting off an increasing number of judicial proceedings from public view.

Andrew G. Sykes

157. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983).
158. *Id.*

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