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Benjamin L. Sells

THE RIGHT OF ACCESS TO JUDICIAL RECORDS: WHEN MAY THE ELECTRONIC MEDIA COPY AUDIO AND VIDEOTAPE EVIDENCE?

United States v. Edwards
672 F.2d 1289 (7th Cir. 1982)

BENJAMIN L. SELLS*

INTRODUCTION

It has been six years since the United States Supreme Court in *Nixon v. Warner Communications, Inc.*,[1] refused media access to the so-called Watergate tapes for copying for subsequent broadcast.[2] Although four dissents were recorded,[3] only two dissenters favored allowing access to the tapes.[4] The remaining dissenters joined with the majority in concluding that access should be denied, albeit for somewhat different reasons.[5] Despite this general concurrence against access, the Court in *Nixon* made clear that there is a general common law right to copy judicial records[6] and thus set the stage for a struggle among the circuit courts of appeals regarding the various factors to be considered in deciding when to permit access.[7]

* B.A. History, 1976, University of North Carolina at Greensboro; M.A. Philosophy and Psychology of Religion, 1983, Southern Methodist University; J.D. expected 1985, IIT Chicago-Kent College of Law.

1. 435 U.S. 589 (1978).

2. *Id.* at 610-11. For a further analysis of *Nixon see infra* notes 20-34 and accompanying text.

3. *Id.* at 611-12 (White, J., joined by Brennan, J., dissenting in part); *id.* at 612-13 (Marshall, J., dissenting); *id.* at 613-17 (Stevens, J., dissenting). For further analysis of these dissents, *see infra* note 34.

4. *Id.* at 612-13 (Marshall, J., dissenting); *id.* at 613-17 (Stevens, J., dissenting).

5. *Id.* at 611-12 (White, J., joined by Brennan, J., dissenting in part). *See infra* note 34.

6. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597. For further analysis of this "common law right" *see infra* notes 19-20 and accompanying text.

7. For a general discussion of the circuits' responses to *Nixon, see* Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 FORDHAM L. REV. 551-81 (March 1982). For an analysis centering on the United States Court of Appeals for the Second Circuit decision in United States v. Myers, 635 F.2d 945 (2nd Cir. 1980), *see* Note, *Common Law Right of Access to Judicial Records—Criminal Defendant's Right to a Fair Trial*, 1981 ARIZ. ST. L.J. 843-51. The confusion left by *Nixon* is also evident in surveying the relationship between the lower court decisions and the appellate decisions cited in this comment. In United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd*, 435 U.S. 589 (1978) the United States Court of Appeals for the District of Columbia reversed a denial of access only to itself be reversed by the United States Supreme Court in *Nixon*. The United States Court of Appeals for the Second Circuit affirmed a grant of access in In re Application of National Broadcasting Company, Inc., et al. (United States v. Myers), 635 F.2d 945 (2d Cir. 1980), while in Belo Broadcasting Corp.

In the years since *Nixon*, the issue of when broadcasters are to be allowed to copy court records for broadcast has repeatedly come before the circuit courts of appeal.[8] The United States Court of Appeals for the Seventh Circuit first met the issue in *United States v. Edwards*.[9] In the four cases preceding *Edwards*, the circuits sought to clarify the relationship between the common law right of access and broader first amendment concerns[10] and sought to reach some consensus on the relative weights to be given various factors in the decision whether to grant access.[11] Most notable among these considerations has been the balancing of the right of access and the sixth amendment guarantee of

v. Clark, 654 F.2d 423 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit affirmed a denial of access. In United States v. Jenrette, 653 F.2d 609 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia reversed a denial of access as did the United States Court of Appeals for the Third Circuit in United States v. Criden, 648 F.2d 814 (3d Cir. 1981). Nor has the access issue been confined to these cases, *see, e.g.*, In re Application of American Broadcasting Companies, Inc., and National Broadcasting Company, Inc., 537 F. Supp. 1168 (D.D.C. 1982) (videotaped deposition not encompassed by common law right to copy); United States v. Pageau, 535 F. Supp. 1031 (N.D.N.Y. 1982) (access to videotape allowed); Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 529 F. Supp. 866 (E.D. Pa. 1981) (access denied); United States v. Carpentier, 526 F. Supp. 292 (E.D.N.Y. 1981) (access allowed); In re Application of KSTP Television (United States v. Ming Sen Shiue), 504 F. Supp. 360 (D. Minn. 1980) (access denied).

8. In re Application of National Broadcasting Company, Inc., et al., Applicants, (United States v. Myers), 635 F.2d 945 (2d Cir. 1980) (hereinafter cited as *Myers*); In re Application of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS, Inc., and Westinghouse Broadcasting Company, Inc. (United States v. Criden), 648 F.2d 814 (3d Cir. 1981) (hereinafter cited as *Criden*); In re Application of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., and CBS, Inc., (United States v. Jenrette), 653 F.2d 609 (D.C. Cir. 1981) (hereinafter cited as *Jenrette*); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981) (hereinafter cited as *Belo*); United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982) (hereinafter cited as *Edwards*).

9. 672 F.2d 1289 (7th Cir. 1982).

10. The Court in *Nixon* made explicit that while its holding in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), extended first amendment protection to access to *information* contained in court records, this did not include the right of *physical access* to court records not made physically accessible to the public. *Nixon*, 435 U.S. at 608-10. Despite this clear ruling by the Court that the right to copy judicial records does not rest on the first amendment but on common law tradition, a few of the circuits, and commentators alike, have remained fascinated with this question. *See, e.g., Criden*, 648 F.2d at 820-22; *Belo*, 654 F.2d at 427-29; Note, *Copying and Broadcasting Video and Audio Tape Evidence*, 50 FORDHAM L. REV. at 554-56, 559-62, 568-71. *See also infra* notes 24-26 and accompanying text.

11. For the factors suggested by the *Nixon* court, *see infra* notes 92-96 and accompanying text. In the cases preceding *Edwards*, the circuits were remarkably consistent in the factors they believed relevant, although they differed on the weights due each factor. Among the factors commonly cited were (1) the presumption of access, *Myers*, 635 F.2d at 952; *Criden*, 648 F.2d at 819-20; *Jenrette*, 653 F.2d at 612; *Belo*, 654 F.2d at 429; (2) that the evidence went to possible misconduct of public officials or agencies, *Myers*, 635 F.2d at 952; *Criden*, 648 F.2d at 819, 822; *Jenrette*, 653 F.2d at 614; *Belo*, 654 F.2d at 429; (3) the nature of video or audio evidence as distinguished from written evidence, *Myers*, 635 F.2d at 953; *Criden*, 648 F.2d at 824; (4) protection of innocent third parties, *Criden*, 648 F.2d at 825, 829; *Jenrette*, 653 F.2d at 619-20; and (5) the threat to pending or future trials, *Myers*, 653 F.2d at 950, 953; *Criden*, 648 F.2d at 826-28; *Jenrette*, 653 F.2d at 615-19; *Belo*, 654 F.2d at 431-32.

a fair trial.[12] In an initial surge of cases following *Nixon*, the United States Courts of Appeals for the Second, Third and District of Columbia Circuits seemed to be united in asserting that the right of access should be given considerable weight, especially when counterbalanced by mere hypothetical threats to a fair trial.[13] In 1981, however, the United States Court of Appeals for the Fifth Circuit rejected the pattern set by the other circuits and held in *Belo Broadcasting Corp. v. Clark*[14] that the sixth amendment fair trial guarantee must be granted prevailing weight and that the common law access right is but one of the varying interests to be considered.[15]

Against this background, the United States Court of Appeals for the Seventh Circuit in *Edwards* held that the district court had not abused its discretion by forbidding access to audio recordings admitted into evidence during trial.[16] However, the Seventh Circuit also made clear that in future cases there should be a strong presumption in favor of the common law right to inspect and copy records,[17] and that the presumption should be overcome only on the basis of "articulable facts known to the court [and] not on the basis of unsupported hypothesis or conjecture."[18]

This comment will review the *Edwards* decision, focusing first on the historic context of the case so as to highlight the principal unresolved issues presented to the Seventh Circuit. Next, the facts of the case and the holding of the district court will be considered. The Seventh Circuit's opinion will then be presented and analyzed. It will be shown that the Seventh Circuit has offered a compromise that upholds the common law right to copy court records for broadcast in the face of hypothetical challenges on fair trial grounds, while keeping intact the discretionary authority needed by lower courts to respond to contingencies presented at the trial level.

PRIOR CASE LAW

The common law right of access to judicial records originated in England where access to records of the King's courts was deemed the right of every subject.[19] Other judicial records were also open to the

12. *See supra* note 11 (factor 5).
13. *See, e.g., Myers*, 635 F.2d at 952; *Criden*, 648 F.2d at 820-23; *Jenrette*, 653 F.2d at 621.
14. 654 F.2d 423 (5th Cir. 1981).
15. *Id.* at 431-34.
16. 672 F.2d 1289, 1295 (7th Cir. 1982).
17. *Id.* at 1290, 1294, 1296.
18. *Id.* at 1294.
19. *See* Note, *Copying and Broadcasting Video and Audio Tape Evidence*, 50 FORDHAM L.

public, although usually on the basis of some interest in the records, for example, the bringing or defense of a legal action. This "interest" test has been dropped in the United States, and the presumption has been to allow access within the discretion of the court.[20] Furthermore, although under the common law access for the purpose of inspection was co-extensive with the right to copy records, the advent of electronic evidence such as audio and video tapes has necessitated a distinction between the two rights. This distinction was clearly drawn by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*[21]

In *Nixon*, the Court reversed the United States Court of Appeals for the District of Columbia decision in *United States v. Mitchell*[22] granting media access to the Watergate tapes for copying for broadcast. Although recognizing a general common law right to copy judicial records, the Court made clear that this right is subject to the discretion of the trial court.[23] In distinguishing between the right of access for the purpose of copying and the right of access for inspection, the *Nixon* Court held that the right to copy judicial records is not guaranteed by either the first or sixth amendments but is a common law right.[24] The Court reiterated its earlier holding in *Cox Broadcasting Corp. v. Cohn*[25] that the first amendment guarantees access to the *information* contained in judicial records, not access to the physical records themselves.[26]

REV. at 557. For further historical background on the common law origins of the right of access, *see* State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334-38 (Sup. Ct. 1879).

20. *See Nixon*, 435 U.S. 589, 597 n.7.

21. 435 U.S. 589 (1978).

22. 551 F.2d 1252 (D.C. Cir. 1976). The District of Columbia Circuit had held that the common law right to copy records was predicated on grounds similar to basic constitutional freedoms:

> Like the First Amendment, then, the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies." And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes.

551 F.2d at 1258 (footnotes omitted). In light of these analogies, the court in *Mitchell* found a strong presumption in favor of access which could not be overcome by mere hypothetical risks of fair trial infringement. *Id.* at 1261. On this basis the court had ruled that the tapes be released for copying once a suitable plan for release had been adopted. *Id.* at 1265.

23. 435 U.S. at 597-98.

24. *Id.* at 609-10. Some courts have held the right of access to be of constitutional magnitude. *See, e.g.*, In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984); United States v. Dorfman, 690 F.2d 1230, 1233-34 (7th Cir. 1982); Associated Press v. United States Dist. Court for Cent. Dist., 705 F.2d 1143-45 (9th Cir. 1983). However, in Newman v. Graddick, 696 F.2d 796, 802-03 (11th Cir. 1983), the court followed *Nixon* in holding that the right of access is a common law right.

25. 420 U.S. 469 (1975).

26. 435 U.S. at 609. The Court based this ruling in part on the principle that the press has no

Thus, *physical* access remains a common law right, but is not protected by the first amendment. Along the same lines, the Court held that the right to copy judicial records is not guaranteed by sixth amendment demands of public trial.[27] Again, the Court emphasized that the issue is one of information. The Court held that, "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and press to attend trial and to report what they have observed."[28] The sixth amendment does not require that the records resulting from or pertaining to a trial be made physically available to the public.

Having established the context of its decision, the Court then noted that its task typically would be to weigh the various interests involved in the access dispute.[29] Along these lines, the court found both "the incremental gain in public understanding . . . that arguably would flow from the release of aural copies of tapes,"[30] and "the presumption—however gauged—in favor of public access to judicial records"[31] to favor granting access to the tapes. However, the Court found no need to balance these pro-access factors against the interests served by a denial of access. Rather, the Court found dispositive "an additional, unique element"[32] not argued by either party in the dispute, namely the Presidential Recordings Act in which Congress had prescribed the procedures to be followed in releasing the tapes.[33] Relying

right of access superior to that of the general public and that the public had never been granted physical access to the tapes in question. *Id.* Further, the question of physical access—meaning the right to copy and publish—did not rest on the same first amendment grounds that protected access to information. *Id.* With regard to the tapes in question, the Court noted that there was "no question of a truncated flow of information to the public." *Id.*

27. *Id.* at 610. The Court rejected the argument that public understanding would remain incomplete absent the ability to actually listen to the tapes. The Court held that this same argument could be applied to live testimony, and yet there was no constitutional right to record and broadcast such testimony. *Id.* The Court's reasoning here, however, ignored the crucial distinction between live testimony and pre-recorded events. The distinction was later drawn in *Edwards* that unlike live broadcast, recordings of pre-existing events do not influence or allow the participants to posture or otherwise change their behavior to play to a television or radio audience. *Edwards*, 672 F.2d at 1295. Despite the distinction, the Court in *Nixon* held that the sixth amendment guarantee of a public trial does not mandate physical access to court records. 435 U.S. at 610.

28. 435 U.S. at 610.

29. *Id.* at 602.

30. *Id.*

31. *Id.*

32. *Id.* at 603.

33. The Presidential Recording Act, Pub. L. No. 93-526, 88 Stat. 1695, 1695-96 (1974) (codified as amended at 44 U.S.C. § 2107 (1978 & Supp. III 1979)) (hereinafter termed the Act) directed the Administrator of General Services to take custody of the Presidential tapes and documents, to supervise screening of these materials in order to edit and return to the President private material, and to release the remaining material for use in judicial proceedings and, ultimately, to the public. 435 U.S. at 603. The provisions of the Act, however, specified that this procedure was to apply to *original* recordings. *Id.* n.15. The majority held that while the Act did not reach the copies of the

on the Act, the Court held that "we need not weigh the parties' competing arguments [since] . . . [t]he presence of an alternative means of public access tips the scales in favor of denying release."[34] By deciding the case on the basis of the Act, the Court left open the key question of the weight to be given the presumption favoring access in future disputes. This question thus became central to the access controversy.

In *United States v. Myers*,[35] the United States Court of Appeals for the Second Circuit affirmed a trial court decision to release for copying videotapes presented for evidence in one of the "Abscam" trials,[36] even though the trial was still in progress and juries had yet to be selected as to related charges pending against three of the defendants.[37] Because *Nixon* had been decided on a statutory basis,[38] the Second Circuit turned to the United States Court of Appeals for the District of Columbia decision in *Mitchell* as the leading precedent. Following the *Mitchell* view that the common law right to copy records should not be denied on the basis of a hypothetical second trial,[39] the Second Circuit went even further and held that once evidence was admitted at trial, "it would take the most extraordinary circumstances to justify [denial of access for copying]."[40] The court rejected the argument that Myers' trial could be prejudiced by access because the jury had already seen

tapes at issue, "court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals," *id.* at 606, and therefore access should be denied since there was "an alternative means of public access." *Id.*

34. *Id.* at 605-06. The dissents in *Nixon* all dealt with the application of the Act to the tapes. Justices White and Brennan opined that § 101(a) of the Act did not reach the tapes in question. Rather, relying on § 101(b) of the Act, the Justices argued that it was irrelevant that the tapes were not originals since "like the conversations on the originals, [the conversations on the copies] occurred during the relevant period [covered by the Act]. Furthermore, if the originals are of historical value, the copies are of equal significance." 435 U.S. at 612 (White, J., and Brennan, J., dissenting in part). Justice Marshall reached the opposite conclusion, noting that neither petitioner nor respondent believed the Act applicable and that the express limitation of the Act to original tape recordings should be strictly construed, thus allowing release of the copies in order to "vindicate a precious common law right [i.e. of access to judicial records], one that predates the Constitution itself." *Id.* at 612 (Marshall, J., dissenting). To further buttress his view, Justice Marshall cited legislative history showing that Congress intended the Act to ensure "the American people . . . full access to all facts about the Watergate affair," *id.* at 613, citing S. REP. NO. 93-1181, p. 4 (1974). Justice Stevens also read the Act as mandating public access to the tapes as quickly as possible and that the intent could be best satisfied by release of the tapes. *Id.* at 616 (Stevens, J., dissenting). That the majority found the Act dispositive in denying access Justice Stevens found "ironic, to put it mildly." *Id.* at 617.

35. 635 F.2d 945 (2d Cir. 1980).

36. For a full analysis of the *Myers* facts and decisions *see* Note, *Common Law Right of Access to Judicial Records—Criminal Defendant's Right to a Fair Trial*, 1981 ARIZ. ST. L.J., 843-51.

37. 635 F.2d at 952-53.

38. *Id.* at 950.

39. *Id.*

40. *Id.* at 952. Indeed, the court went even further, noting that the presumption favoring access "is especially strong in a case like this where the evidence shows the actions of public officials, both the defendants and law enforcement personnel." *Id.*

the videotapes and the trial judge was entitled to rely on the jury's observance of his order to avoid exposure to media replays of the tapes.[41] As to the pending trials of the other defendants, the court held that although televising of the tapes would increase public awareness,[42] this did not pose a significant enough risk to justify restricting the public right of access to courtroom evidence.[43] The court noted that defendants and news media alike often overestimate the impact of media coverage and that the opportunity for voir dire examination,[44] and the more extreme options of continuance or change of venue, are satisfactory methods by which to deal with possible difficulty in impanelling a fair jury.[45]

Less than one year later, the United States Court of Appeals for the Third Circuit in *United States v. Criden*[46] followed the Second Circuit's lead and reversed and remanded a trial court decision denying access to videotape evidence.[47] Although not as emphatic as the *Myers* court, the Third Circuit in *Criden* also found a strong presumption favoring access.[48] The *Criden* court further held that because the trial court's decision was "not dependent in the main on particular observations of the trial court"[49] that in the interest of consistency of judgment[50] its decision was not to be accorded "the narrow review reserved for discretionary decisions based on first-hand observations."[51] The

41. *Id.* at 953.

42. The court held:

> We do not doubt the premise of [the] claim that televising the tapes will greatly increase the number of people with knowledge of their content . . . [n]or do we doubt that seeing the tapes on television will create a stronger impression of the events among those who already have been exposed to news accounts of their contents.

Id.

43. "We disagree . . . that the likelihood of . . . enhanced awareness . . . poses the kind of risk to fair trials . . . that justifies curtailing the public's right of access to courtroom evidence." *Id.*

44. *Id.*

45. *Id.* at 953-54.

46. 648 F.2d 814 (3d Cir. 1981).

47. Like the *Myers* case, *Criden* involved the FBI Abscam operation revealing alleged bribery and related offenses of public officials. The evidence in question, like that in *Myers*, visually depicted alleged acts of influence peddling. For further details, *see Myers*, 635 F.2d 945 (2d Cir. 1980) and United States v. Jannotti, 504 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

48. 648 F.2d at 819.

49. *Id.* at 818.

50. *Id.*

51. *Id.* Thus, the *Criden* court extended appellate review to the relevance and weight of the factors considered by the trial court as opposed to applying the traditional test for abuse of discretion of whether the necessary questions had been entertained and reasonably answered. The court distinguished the trial court ruling from "those situations where the decision depends on first-hand observation or direct contact with the litigation." *Id.* at 817. Rather, the *Criden* court found compelling the interests of consistency of judgment and, more fundamentally, the notion that

Third Circuit then went on to hold that the important right of the public to open courts, which was furthered by the access right, could not be denied on the basis of conjecture about possible fair trial infringement.[52]

In *United States v. Jenrette*,[53] the United States Court of Appeals for the District of Columbia was afforded another opportunity to expand on its ruling in *Mitchell* five years earlier. As had the courts in *Myers* and *Criden* before it, the *Jenrette* court simply refused to accord hypothetical fair trial risks sufficient weight to overcome the strong presumption in favor of access.[54] In reversing the trial court's denial of access, the court noted that, although possible injury to innocent third persons may in some instances militate against access, the risk of such injury would be obviated by editing out those portions which create the risk.[55] However, the court made clear that such editing was appropriate only where the objectionable portions were so damaging as to outweigh the strong presumption favoring unrestricted access.[56]

Against this background of cases suggesting that (1) there is a strong presumption in favor of access and (2) that this presumption allows broad ranging appellate review of trial court discretion, came the United States Court of Appeals for the Fifth Circuit opinion in *Belo Broadcasting Corp. v. Clark*.[57] In *Belo*, the Fifth Circuit affirmed the trial court's denial of access to videotapes introduced in the so-called "Brilab" trial.[58] The *Belo* court rejected the *Criden* court's view that appellate review in access disputes should reach "the relevance and

"unreviewable discretion offends a deep sense of fitness in our view of the administration of justice." *Id.* at 818, citing Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 641-42. Furthermore, although it may be argued that trial courts should be accorded broad discretion when faced with new circumstances and variables, the *Criden* court considered this factor in light of the need for appellate guidance so as to assure predictable, consistent results. 648 F.2d at 818.

52. *Id.* at 826-28. The court found that the trial court had given inadequate weight to alternative means of protecting the fair trial right, such as voir dire. *Id.* at 828. While the fair trial issue was paramount, the court also was unconvinced by the trial judge's reliance on a number of other factors, including the difference between videotape evidence and other forms of evidence, *id.* at 823-24; concerns about the initial admissibility of the tapes, *id.* at 828; the prohibitions against broadcasting actual trials, *id.* at 828-29, and; the existence of possible "scurrilous and libelous" statements about third parties, *id.* at 829.

53. 653 F.2d 609 (D.C. Cir. 1981). Again, this case arose out of the Abscam operation, and again, the evidence in question depicted influence peddling by government officials.

54. *Id.* at 615-17.

55. "If the objections are found to be meritorious, the district court may sanitize the objectionable portions of the tapes to remove the offending remarks or order that the identity of the innocent third person be deleted." *Id.* at 620 (footnote omitted).

56. *Id.* at 620-21.

57. 654 F.2d 423 (5th Cir. 1981).

58. *Id.* at 425.

weight of the factors [considered by the trial court]."[59] Rather, the Fifth Circuit, relying on *Nixon*, held that the decision fell firmly within the trial court's discretionary powers.[60] Thus, the *Belo* court held that the trial court order was subject to reversal only on the basis of egregious error.[61] Likewise, the court rejected the standards followed by the *Myers* and *Jenrette* courts because they too were seen as holding the discretionary authority open to excessively broad based appellate review.[62]

The Fifth Circuit further held that the right to access should not be granted priority over possible fair trial conflicts when those conflicts are uncertain or merely hypothetical.[63] The court stated that

> [t]he informed and considered judgment of the trial judge should prevail in any choice between such equally speculative results. It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury.[64]

Hence, in the years since *Nixon*, the circuits have disagreed on (1) the comparative weight to be given the presumption in favor of access and fair trial considerations, and (2) the accompanying question of the applicable standard of appellate review of a trial court's discretionary rulings regarding access. In *Edwards*, the Seventh Circuit attempted to bridge this impasse.

59. The [*Criden*] court found that a decision on release of tapes "is not accorded the narrow review reserved for discretionary decisions based on first hand observations" of the trial judge. We have considered this analysis presented by the Third Circuit but are unable to follow it beyond its foundation—that the decision to grant or deny access to tapes during the course of a criminal prosecution is not based on "first hand observations" of the presiding trial judge. When the concern is the efficient administration of justice and the provision to defendants of fair trials, the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge.

Id. at 431 n.18 (citations omitted).

60. The *Belo* court cited the following passage from *Nixon* as determinative: "The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal." 654 F.2d at 431 (quoting Nixon v. Warner Communications, 435 U.S. at 613-14 (Stevens, J., dissenting)). Notably, the *Belo* court here rested its opinion on the dissent by Justice Stevens rather than on the language of the majority. *Id.* at 430-31.

61. 654 F.2d at 431. *See supra* note 60.

62. "In our judgment, the opinion in Nixon v. Warner Communications offers no basis from which one can derive the overpowering presumption in favor of access discovered by the Second and District of Columbia Circuits." *Id.* at 433-34. Further, the *Belo* court noted that, "[i]f the courts' approaches in *Myers* and *Jenrette* are misguided, as we suggest, then the *Criden* court shares that error." *Id.*, n.25.

63. *Id.* at 434.

64. *Id.* at 431.

FACTS OF EDWARDS

In November of 1980, Martin K. Edwards, a state Senator and President Pro Tempore of the Indiana State Legislature, and Francis B. Kendall, a private businessman, were tried on charges relating to bribes paid in return for influencing legislation.[65] During the trial, an audio recording of a telephone conversation between Edwards and John L. Cline was admitted into evidence and played in open court.[66] The day before, full transcripts of the tape recordings had been published in The Indianapolis News and The Indianapolis Star newspapers.[67] After the recording had been admitted into evidence, Video-Indiana, Inc., a television broadcasting station, and Mid-America Radio, Inc., a radio station, informally requested the court to allow copying of the recording for broadcast.[68] The court instructed the stations (hereinafter termed the "Broadcasters") to submit formal applications.[69] On November 20, 1980, the Broadcasters applied for permission to copy, for broadcast contemporaneous with the trial, all video and audio recordings already admitted or which might be admitted into evidence.[70] After hearing oral arguments, at which counsel for both the defendants and the United States opposed the grant of access, the court denied the Broadcasters' applications.[71]

The trial court gave three reasons justifying its decision to deny access.[72] First, the court expressed concern that to allow access during the trial might be interpreted by the jury as placing a judicial imprimatur upon evidence which might be overcome by subsequent evidence.[73] Second, the court ruled that broadcast of the recording might make it difficult to draw a jury in an anticipated tax evasion trial of defendant Edwards.[74] Last, the court relied on a resolution of the Judicial Conference of the United States reaffirming a ban against contemporaneous broadcast of trials as a factor militating against allowing the

65. 672 F.2d at 1290. Details of the bribery scheme are discussed in United States v. Kendall, 665 F.2d 126 (7th Cir. 1981).

66. 672 F.2d at 1290.

67. *Id.* at 1291.

68. *Id.*

69. *Id.*

70. An application was also filed by McGraw-Hill Broadcasting, Inc. Although their request was also denied, they are not a party to the *Edwards* appeal. *Id.* n.4.

71. Although the United States initially opposed access, once it became clear that Edwards' second trial would be completed before the issue of access was finally decided, the Government withdrew its opposition. *Id.*

72. The decision denying access was delivered from the bench. No written memorandum was issued by the court. *Id.*

73. *Id.*

74. *Id.*

copying of the recording.[75]

The Broadcasters appealed the district court order to the United States Court of Appeals for the Seventh Circuit.[76] In order to fully explore the issues presented, the court of appeals requested an independent attorney to file a brief and argue as amicus in support of the trial court's ruling.[77]

The Seventh Circuit first held that, contrary to the argument of the amicus, the issue was not moot even though the ending of the defendant's trial had rendered contemporaneous broadcast impossible.[78] Agreeing with the Broadcasters, the court held that the dispute was "capable of repetition, yet evading review."[79]

75. *Id.* Apparently the trial judge was referring to Canon 3A(7) of the Code of Judicial Conduct for United States Judges. 672 F.2d at 1295. Canon 3A(7) reads in pertinent part:

> The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:
>
> A. Adjudicative Responsibilities.
>
> . . . .
>
> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
>
> (b) the broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings;
>
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
>
> (i) the means of recording will not distract participants or impair the dignity of the proceedings;
>
> (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
>
> (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
>
> (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

76. 672 F.2d at 1291.

77. *Id.* The court explained that an amicus was needed "[b]ecause the answering brief of [the] defendants . . . was wholly perfunctory in nature and the Government's brief indicated that it would not oppose release of the tape if . . . the second trial of Edwards was completed before oral argument." *Id.*

78. It is reasonably foreseeable that in other criminal trials similar applications for access to tape recordings . . . will be made . . . It is also likely that in such cases the criminal trials will be of sufficiently short duration that an order denying access will evade appellate review during the period in which contemporaneous access could be granted. . . . Thus, while it would be impossible for us to direct the district court to now accord the specific relief requested, mootness does not preclude consideration of the merits.

Id. at 1292 (citations omitted).

79. *Id.* at 1291 (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). *See also supra* note 78. Thus, the court considered this case to fall within a traditional exception to the mootness doctrine.

Turning to the merits of the case, the court relied on the Supreme Court's decision in *Nixon v. Warner Communications*,[80] and held that although there is a clear common law right to inspect and copy judicial records, that right is not absolute. Rather, the right is left to the discretion of the trial court to be decided in light of the relevant facts and circumstances of a particular case.[81] Considering the trial court's ruling, the Seventh Circuit found that the court had made a conscientious and informed decision and had not abused its discretion.[82] Although the Seventh Circuit found neither the Judicial Conference Resolution[83] nor the pendency of trial[84] sufficient grounds for denial of access, it did find the threat to Edwards' future trial "more than merely hypothetical" and thus sufficient to support the discretionary ruling denying access.[85]

Although affirming the trial court in *Edwards*, the Seventh Circuit also held that in future cases a strong presumption should be granted in favor of access.[86] Where there is a conflict between this presumption and the defendant's right to a fair trial, access should be denied only "on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture."[87]

UNITED STATES V. EDWARDS: THE SEVENTH CIRCUIT DECISION

The United States Court of Appeals for the Seventh Circuit began its opinion in *Edwards* by drawing upon *Nixon* for the proposition that, although there is a general common law right to copy judicial records,[88] this right is not absolute.[89] The decision whether to grant access to evidence for copying is always within "the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[90] Although *Nixon* did not involve a true balancing of interests,[91] the Seventh Circuit canvassed some of the

80. 435 U.S. 589. For further analysis of *Nixon*, *see infra* notes 20-34 and accompanying text.
81. 672 F.2d at 1292-93 (citing *Nixon*, 435 U.S. at 597-99).
82. *Id.* at 1295. For analysis of this ruling, *see infra* notes 133-38 and accompanying text.
83. *Id.* at 1295. For further analysis, *see infra* notes 111-14 and accompanying text.
84. *Id.* at 1295-96. For further analysis of this point, *see infra* notes 115-21 and accompanying text.
85. *Id.* at 1296. For further analysis of this point, *see infra* notes 122-26 and accompanying text.
86. *Id.* at 1290, 1294, 1296.
87. *Id.* at 1294.
88. 672 F.2d at 1292-93 (citing *Nixon*, 435 U.S. at 597-99). *See also supra* note 19-21 and accompanying text.
89. *Id.*
90. *Id.*
91. *Id.* at 1293. *See also supra* notes 31-32 and accompanying text.

factors cited in *Nixon* as possible factors for consideration, among these whether the material sought would "be used to gratify private spite or promote public scandal;"[92] whether the petitioner sought to use the evidence as "reservoirs of libelous statements for press consumption . . . or as sources of business information that might harm a litigant's competitive standing;"[93] whether the court had already permitted "considerable public access;"[94] whether access would appreciably enhance public understanding;[95] and whether granting the request for access would prejudice the due process rights of a defendant.[96] The Seventh Circuit ended its review of *Nixon* by noting that the Court had indicated that trial court discretion must be guided by a "sensitive appreciation of the circumstances that led to . . . [the] production [of the materials],"[97] and by the "presumption—however gauged—in favor of public access."[98] On the basis of this review, and after emphasizing that *Nixon* had been decided on the basis of the Presidential Recordings Act, the Seventh Circuit concluded that the central unanswered question was the strength to be granted the presumption in favor of access.[99]

In analyzing the access presumption, the Seventh Circuit noted the split among the circuits.[100] The court agreed with the Fifth Circuit that the right to access rests on common law tradition and that "a number of factors may militate against public access."[101] The court then noted that the common law right "supports and furthers many of the same interests which underlie those freedoms protected by the Constitution."[102] Although the court refused to hold that only exceptional

92. *Id.* (quoting 435 U.S. at 598).
93. *Id.*
94. *Id.* (quoting 435 U.S. at 599 n.11).
95. *Id.* (citing 435 U.S. at 602).
96. *Id.*
97. *Id.* (quoting 435 U.S. at 603).
98. *Id.*
99. "Subsequent court of appeals decisions have addressed the critical question left unresolved by *Warner Communications*, namely the strength of the presumption in favor of public access." *Id.*
100. *Id.* at 1293-94. *See also supra* notes 7, 8, 35-64 and accompanying text.
101. 672 F.2d at 1294 (quoting 654 F.2d at 434).
102. 672 F.2d at 1294. On this point the Seventh Circuit turned to *Mitchell*, where Chief Judge Bazelon wrote:

> This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. . . . Like the First Amendment, . . . the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies." And . . . like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by

circumstances will justify non-access, as had the Second Circuit in *Myers*,[103] it did conclude that there should be a strong presumption in favor of access which can be overcome "only on the basis of articulable facts known to the court, [and] not on the basis of unsupported hypothesis or conjecture."[104] Further, the court made clear that the trial court must clearly state the reasons for its decision, "so as to permit appellate review of whether relevant factors were considered and given appropriate weight."[105]

Turning to the merits of the case, the court concluded that the trial court in *Edwards* had not abused its discretion by denying access.[106] The court was impressed that the trial court had been forced to act without clear direction from either the Supreme Court or the Seventh Circuit Court of Appeals.[107] Faced with this precedential vacuum, the trial judge had been forced to rely on the Supreme Court's vague opinion in *Nixon*, the Second Circuit opinion in *Myers* allowing access, and the District Court opinion in *Criden* denying access.[108] Of these cases, the trial judge had opted for the *Criden* court's denial of access on the basis of possible fair trial conflicts and articulated three reasons for denying access.[109] The Seventh Circuit was "unwilling to say that this course of conduct constituted an abuse of discretion."[110]

The Seventh Circuit found the trial court's reliance on the Judicial Conference Resolution prohibiting the broadcasting of trial unwarranted.[111] Noting that the resolution was based "on apprehension about the effect that contemporaneous broadcast of trial proceedings might have on the conduct of the trial itself,"[112] the Seventh Circuit

> providing those who were and those who were not able to gain entry to . . . [the] courtroom the same opportunity to hear the . . . tapes.

Id. at 1294 (quoting *Mitchell*, 551 F.2d at 1258 (footnotes omitted; brackets added)).

103. 635 F.2d at 952.

104. 672 F.2d at 1294. Further, the *Edwards* court noted that this is "[a]ll the more . . . true in the present case since the trial bore upon the conduct of a public official." *Id.* n.11, (citing *Criden*, 648 F.2d at 822, and *Myers*, 635 F.2d at 952).

105. 672 F.2d at 1294.

106. *Id.* at 1295. Presaging its implicit holding that while the trial judge had not abused his discretion this did not mean the Seventh Circuit believed him correct, the court noted that, "[o]f course, nothing in this decision precludes the Broadcasters from seeking post-trial access to the tape for the purpose of copying and broadcasting. Any decision on such a motion shall be guided by and consistent with the principles articulated herein." *Id.* n.13. *See also infra* notes 134-38 and accompanying text.

107. 672 F.2d at 1295.

108. *Id.* Of course, the trial judge did not have available the later Third Circuit reversal of the district court in *Criden*.

109. *Id. See also supra* notes 72-74 and accompanying text.

110. *Id.*

111. *Id.*

112. *Id.* (quoting *Criden*, 648 F.2d at 828-29).

found no like threat with regard to a recording of a pre-existing event.[113] Unlike contemporaneous broadcast, said the court, recordings of prior events do not allow the participants to "posture or otherwise change their behavior to play before . . . [an] audience."[114]

Regarding the pendency of trial as a factor to be weighed in deciding whether to allow access, the court deemed it necessary for the trial court to carefully consider the effect of access on the proceedings.[115] Again, however, the Seventh Circuit emphasized that such a consideration should be made in light of a strong presumption in favor of access.[116] The court found that, because the question of access usually would arise only *after* the jury had already been exposed to the evidence in question, the trial judge ordinarily could conclude that the possibility of prejudice arising from repeated exposure was so remote as to not threaten a fair trial.[117] However, in the exceptional case, where the publicity surrounding the trial had made jury selection difficult and had created a "circus atmosphere around the trial, . . .[118] or where the administrative and mechanical difficulties" attending copying of the evidence would interfere with the proceedings,[119] then denial of access might be required. Because the decision whether to allow or deny access depends upon the particular circumstances surrounding a case, the court held that the decision is one which falls within the trial court's discretionary authority.[120] The court also noted that the problem of a jury interpreting the permitting of access as a judicial imprimatur on the evidence in question could normally be resolved by a firm instruction by the trial judge that the court was expressing no opinion on the merits of the evidence.[121]

113. *Id.*

114. *Id.* (quoting *Criden*, 648 F.2d at 828-29). The trial judge's blurring of the distinct issues of broadcast of live testimony and that of recordings of pre-existing events repeated a like blurring by the Court in *Nixon*. *See supra* note 27. The *Criden* and *Edwards* courts, however, do not stand alone in their distinction between these issues. *See, e.g., Myers*, 635 F.2d at 952 n.5 and *Jenrette*, 653 F.2d at 620 n.60. Both of these latter cases were also cited by the *Edwards* court. 672 F.2d at 1295.

115. *Id.*

116. *Id.* at 1295-96.

117. *Id.* at 1296.

118. *Id.* As an example of such an instance, the court cited Sheppard v. Maxwell, 384 U.S. 333 (1966).

119. 672 F.2d at 1295 (citing to the decision of the lower court in *Mitchell*, 386 F. Supp. 639 (D.D.C. 1975)).

120. We can state no hard-and-fast rule. Indeed, it is [b]ecause of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.

Id. at 1296 (quoting *Jenrette*, 653 F.2d at 613).

121. Thus, the court found unconvincing the trial judge's concern about such a judicial impri-

Related to the question of the pendency of trial was the trial court's justification in *Edwards* to deny access because of the resulting difficulty in impanelling a jury in subsequent trials involving the defendants.[122] The Seventh Circuit agreed that when an appeal is pending it may be proper to consider whether reversal would require a new trial.[123] In *Edwards* the Seventh Circuit found that the pending tax evasion charges against Edwards made a trial more than merely hypothetical and thus did provide a basis for the trial judge's decision to deny access.[124] Although the trial judge had himself noted that the difficulty in impanelling a jury could be overcome,[125] the Seventh Circuit nevertheless held that an abuse of discretion was not present where "the court considered both the problem of tainting the current trial and the expected trial."[126]

ANALYSIS OF *UNITED STATES V. EDWARDS*

When *Edwards* reached the United States Court of Appeals for the Seventh Circuit, the court was faced with conflicting precedent. The Second Circuit had held that only extraordinary circumstances would justify denial of access.[127] The Third Circuit had not only held there to be a strong presumption in favor of access, but also held that appellate review should not be limited to the narrow review normally accorded discretionary rulings but should extend to the relevance and weight accorded the conflicting interests considered.[128] The Fifth Circuit had rejected both a strong presumption in favor of access and the notion of

matur on the evidence in question and re-emphasized the strong presumption in favor of access to be given in future cases. *Id.* at 1296.

122. *Id.*

123. The issue may arise, as here, because the defendant has yet to be separately tried on other charges, because the evidence could reasonably have an effect on trials involving other individuals, or perhaps for other reasons. Where the application [for access] is made after trial, while an appeal is pending, it may be proper to consider that reversal would require a new trial.

Id. Turning to the precedent on this issue, the court noted that, "[i]n general, those courts which find the presumption of access to be strong tend to discount the risk of harm to other proceedings, whereas those which minimize the importance of the presumption accentuate potential jeopardy to other cases." *Id.* The court, however, refused to choose sides and claimed it "would be folly for us to attempt now, through detailed analysis of other decisions, to state a broad rule covering all possible situations. Rather we address ourselves simply to the relevant circumstances in the present case." *Id.*

124. *Id.*

125. *Id.* at 1291. The trial court had expressly noted that through proper voir dire examination a jury could be selected "with a fair and impartial attitude." *Id.* This acknowledgement, in the opinion of the Seventh Circuit, made the case closer, but still could not overcome the respect granted the discretionary ruling in this case. *Id.* at 1296.

126. *Id.*

127. *See supra* notes 40-45 and accompanying text.

128. *See supra* notes 46-52 and accompanying text.

broad-based review.[129] The Supreme Court's decision in *Nixon* was of little help regarding the weight due the access right,[130] but did seem to suggest that the decision as to access was meant to lie within the trial court's discretionary authority.[131] Presented with these diverse holdings, the Seventh Circuit decision attempted to mold a compromise position.

By first rejecting the Second Circuit's view in *Myers* that only exceptional circumstances will justify denial of access, the Seventh Circuit signaled a move toward compromise. However, despite its partial rejection of the *Myers* holding, the court assumed a strong stance, as had the Second and Third Circuits, in favor of access.[132]

As for the Third Circuit's *Criden* decision, the Seventh Circuit in *Edwards* relied on *Nixon* to move away from the broad-based appellate review espoused in *Criden.*[133] Indeed, it is significant that the *Edwards* decision did not hold the trial judge's denial of access to be the *correct* decision. Rather, the Seventh Circuit restricted its review to the trial judge's *conduct* and the narrow question of whether there had been an abuse of discretion.[134] Because the trial judge had been faced with vague and confusing precedent and had conscientiously performed his task in articulating three reasons for his decision, the Seventh Circuit declined to rule he had abused his discretionary authority.[135] Of the three reasons given by the trial court, only one, the threat to future

129. *See supra* notes 59-64 and accompanying text.

130. *See supra* notes 29-34 and accompanying text.

131. *See Nixon*, 435 U.S. at 598, 599 (majority opinion), 613-14 (Stevens, J., dissenting).

132. "[W]hile we are unwilling to go so far as the Second Circuit's statement that only exceptional circumstances will justify non-access, we hold that there is a strong presumption in support of the common law right to inspect and copy judicial records." 672 F.2d at 1294 (footnote omitted).

133. *Id.* at 1293, citing the Court in *Nixon* where it stated "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* (quoting *Nixon*, 435 U.S. at 599).

134. The *Edwards* court refused to consider whether, without sufficient guidance, the trial judge had properly decided the access question. Thus, the court refused to follow the *Criden* approach which held concerns for predictability and consistency of discretionary decisions to demand broad appellate review. Rather, the *Edwards* court seems to be following the other line of argument noted and rejected by *Criden* that:

> [W]hen circumstances are either so variable or so new that it is not yet advisable to frame a binding rule of law, trial courts may be given discretion until the factors important to a decision and the weight to be accorded them emerge from the montage of fact patterns which arise. . . . Often, in time, the contours of a guiding rule or even principle may develop as the courts begin to identify the policies which should control.

648 F.2d at 818. Following the clear ruling in *Edwards* favoring access, and considering the court's signal to the Broadcasters in *Edwards* that renewed applications would be considered in this light, *see supra* note 106, the Seventh Circuit apparently believes that while the trial judge properly exercised his discretion absent guidance, that guidance is now available and strongly suggests permitting access to the tape in question.

135. 672 F.2d at 1295.

trials, was considered by the Seventh Circuit to be sufficient to justify the trial court's ruling, and even this one was notably weak in the eyes of the court of appeals.[136] By limiting its review to asking, (1) whether the trial court had considered the problem of "tainting the current trial and the expected trial,"[137] and (2) whether the trial court had articulated facts known to it in denying access rather than relying on conjecture, the Seventh Circuit rejected the *Criden* approach and adopted the Fifth Circuit's narrow standard of review in *Belo*.[138]

However, the Seventh Circuit was careful to adopt only that portion of the *Belo* holding related to the nature of appellate review. The *Edwards* court rejected that portion of *Belo* which held that the presumption in favor of access was but one factor to be considered and that possible fair trial conflicts should be given priority. The Seventh Circuit emphasized instead that conjecture or hypothetical dangers to fair trial rights are not sufficient to overcome the strong presumption in favor of access.[139]

IMPACT OF THE *EDWARDS* DECISION

The significance of the trial judge's position in *Edwards* cannot be overestimated in understanding the Seventh Circuit's opinion. Clearly, the Seventh Circuit was impressed both by the lack of guidance available to the lower court when faced with a difficult decision and the judge's conscientious efforts to reach the correct decision.[140] However, it is unlikely that were such a case to arise now, given a similar fact situation and holding by the trial court, that denial of access would be upheld. For now it is indisputable that the Seventh Circuit holds the presumption in favor of access to be of such strength that it may be overcome only by articulable dangers to other important rights. While the decision of a trial court to deny access is still discretionary, it is now a decision which must be made in the face of clear precedent granting a strong presumption favoring access. With guidance on this point now available, and with the Seventh Circuit's suggestions as to how to accommodate countervailing interests without denial of access, it is un-

136. *Id.* at 1295 (rejecting the Judicial Conference Resolution); *id.* at 1296 (suggesting the pendency of trial insufficient to warrant denial of access in this case); *id.* (that judges considered tainting of future trial sufficient to justify discretionary ruling in this case.) *See also supra* notes 111-26 and accompanying text.

137. *Id.* at 1296.

138. *Id.* at 1295. *See also supra* notes 59-62 (*Belo* court's limitation of discretionary review) and 134 (rejection by *Edwards* court of *Criden*) and accompanying text.

139. *Id.* at 1294.

140. *Id.* at 1295.

likely that denial of access will be upheld without a clear showing that the trial court has exhausted alternative solutions.

Of course, the *Edwards* decision is but one in a string of appellate court cases dealing with the right to copy judicial records for broadcast. It remains to be seen whether the other circuits will seize upon *Edwards* as a compromise opinion or whether they will continue to espouse their own stances pending some clearer statement by the Supreme Court. However, within the Seventh Circuit the decision of whether to grant or deny access now must be made within the firm and clearly articulated boundaries set forth in *Edwards*.[141]

CONCLUSION

In *Edwards*, the Seventh Circuit has issued a decision that potentially could resolve the split among the circuits concerning the guidelines of the right of access. Like the Second, Third and District of Columbia circuits, the Seventh Circuit has held that there is a strong presumption in favor of access. Like the Fifth Circuit, it has also held that once guidelines are clear the decision of whether to grant access is a discretionary one which should be accorded great respect at the appellate level. And, like all of the circuits which have grappled with the issue, the Seventh Circuit has agreed that infringement of fair trial guarantees is the strongest countervailing interest capable of rebutting the presumption in favor of access. However, the threat to a fair trial must be actual and not mere conjecture and all alternative methods of guaranteeing a fair trial must be exhausted before denial of access will be upheld.

141. Indeed, since *Edwards*, courts within the Seventh Circuit have already relied upon it in allowing access. For example, in United States v. Shannon, 540 F. Supp. 769 (N.D. Ill. 1982), the court allowed access to audio recordings on the basis of the *Edwards* decision, noting that, "[w]hile the Court may deny access, the burden is upon the party seeking to interfere with [the] . . . common law right [of access] to demonstrate that justice requires denial of access. The Court may not, however, deny access on the basis of unsupported hypothesis or conjecture." 540 F. Supp. at 771. *See also* United States v. Dorfman, 550 F. Supp. 877 (N.D. Ill. 1982). *Edwards* also has been relied upon by other circuits to allow access, *see, e.g.*, United States v. Mouzin, 559 F. Supp. 463 (C.D. Cal. 1983); Application of WFMJ Broadcasting Co. (United States v. Traficant), 566 F. Supp. 1036 (N.D. Ohio 1983). Moreover, it should be noted that the presumption favoring access presumably extends beyond audio and visual tapes and film to all forms of physical evidence amenable to copying such as computerized tapes or cards. The right also should extend to all manner of copying of evidence, be it recording tapes or photographing exhibits.