Journal of Law and Policy

Volume 9
Issue 1SYMPOSIUM:
The David G. Trager Public Policy Symposium
Behind Closed Doors: Secret Justice in America

Article 2

2000

PANEL 1: Secrecy and the Criminal Justice System

William E. Hellerstein

Hon. Michael B. Mukasey

Mary Jo White

Adam Liptak

Gerald L. Shargel

PANEL I: SECRECY AND THE CRIMINAL JUSTICE SYSTEM

William E. Hellerstein[*]

Good morning. In 1914, Justice Brandeis wrote that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] Implicit in this simple aphorism is that openness is a foundational differentiating characteristic that serves to distinguish a free society from one that is not. Indeed, we in America have persistently and loudly proclaimed that ours is an open society, one that compares favorably not only to totalitarian regimes but also to others that are less open than ours.

The subject of this panel, "Secrecy in the Criminal Justice System," will focus on the greatest source of tension in our constitutional framework – that between openness and the occasional necessity for secrecy as to proceedings in which personal liberty is at stake. It is a tension that sorely tests our commitment to basic constitutional principles. Our heritage has set itself squarely against the Court of Star Chamber in ancient England.[2] Yet the exigencies of our times continue to test our commitment to openness. It is this delicate balance between openness and secrecy

---

[*] Professor of Law, Brooklyn Law School.

[1] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

[2] *See* 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 347, 397 (William C. Jones ed., Claitor's Publ'g Div. 1976). The Court of Star Chamber was authorized to "inquire into all offenses against the government, and to commit offenders to safe custody." *Id.* at 347. This court of law was the judicial branch of England's King's Council between 1485 and 1641 and is named after a star on the ceiling of a room in the old palace of Westminster. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999). The court became infamous for its abusive discretion. Pursuant to statute, the court was divested of all criminal law jurisdiction. Thereafter, the court dealt mainly with land disputes. *Id.*

in the criminal justice system that our courts are asked to maintain and that the public, we, are asked to appreciate.

Our panel's charge is to explore whether in attempting to maintain that delicate balance we are succeeding or whether in fact we are drifting away more than is necessary towards a universe that is more closed than is appropriate and fair, and which perforce threatens due process of law. The composition of our panel is more than well situated to discuss the various tension points in the criminal justice system that put at peril our commitment to openness. To conserve time, I will not dwell on the credentials of our four panelists. Their respective vitae are set forth in our brochure and I am sure that if you have not already examined it, you will.

Our first speaker will be the Honorable Michael B. Mukasey of the United States District Court for the Southern District of New York. He will give us the judicial perspective on the secrecy conundra that affect high profile cases, especially those involving international terrorism. One only has to be in the company of Judge Mukasey at a conference or a retreat to appreciate what consequences to his own private life his involvement in terrorist cases have created. This involvement simply indicates the delicate nature of the process that touches upon cases of such moment.

Our second speaker will be Mary Jo White, United States Attorney for the Southern District of New York. As you will agree, I am sure, her talents and professionalism have continued the great traditions of her office. She, no less than Judge Mukasey, has been at the center of the most serious international terrorist incidents of our time. She will speak to us about secrecy from the perspective of the prosecutor who must investigate these incidents, gather and present evidence, and maintain continuing investigations on a national and international level. Yet, she too must operate under our presumptive system of openness. She will speak about the manner in which she strives to maintain that delicate balance.

Our third speaker, Adam Liptak, is the Senior Counsel to The New York Times Company. He will speak from the perspective of someone who is on the outside looking in; that is, one whom secret proceedings and sealing of public documents seek to exclude, in the greater interest of national security and other similar interests. In this regard, Mr. Liptak represents all of us and he works from

the broad body of First Amendment jurisprudence that the Supreme Court has given us with respect to press access. Nonetheless, as he will tell you, we do not necessarily get what we see.

Our final speaker, Gerald L. Shargel, is one of the most eminent defense attorneys of our time. As Dean Wexler noted, he is a graduate of this Law School. He shares his wisdom and skills with our students as an adjunct professor of Trial Advocacy. Furthermore, he is one of those rare members of the defense bar who is as skillful in the appellate court as he is in the trial court. Mr. Shargel will focus on the day-to-day secrecy issues that confront defense counsel in the more usual run of criminal cases.

Hon. Michael B. Mukasey[*]

Thank you. There is a kind of "gee whiz" aspect to discussions of secrecy, particularly in connection with terrorism trials. I think that ought to be mitigated a bit. The secrecy problems associated with high profile cases generally, and terrorist cases in particular, are just a subset of the secrecy problems that are associated with trials generally. Initially, trials involve attempts to assure that defendants receive a fair trial and the outcome of their trial is not influenced by what jurors read or hear. The outcome is also influenced by the fact that in virtually any trial, civil or criminal, the court necessarily becomes the repository for the confidences of the parties. This is true regardless of whom the parties call as witnesses or whatever their attempts to subpoena documents before trial are. Thus, we are operating in an area that is really common to many cases and perhaps gets the most focus in high profile cases. It is, however, something we deal with every day.

In criminal cases, parties frequently subpoena documents before trial under Federal Rule of Criminal Procedure 17(c).[1] Those proceedings are almost always held *in camera* and *ex parte*. One side, for example, approaches the court for authorization to obtain documents from the opposing side for use at trial. The other side does not know about this release of information because adversaries are reluctant to reveal any possible advantages. Thus, the pro-

---

[*] United States District Court Judge, Southern District of New York.

[1] FED. R. CRIM. P. 17(c). Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Id.

ceeding continues almost entirely in secret. Eventually, of course, evidence that is subpoenaed becomes public because it is presented at trial. If litigation on these issues is a possibility, it is unclear whether that will be public.

The first problem encountered in a high profile case involves the selection of an anonymous jury. This process becomes necessary in high profile cases to protect the security of jurors. The confidential information in that case, mercifully, is something that even the court, and in a sense, the judge, is unaware of. The clerk knows the names of the jurors; the judge and the parties do not. The court tries at all costs to keep that information secret.

In *United States v. Rahman*, a terrorism case I tried,[2] the identities of at least two of the jurors became known to some reporters after the case was over. As a result, those reporters camped outside the jurors' doors to discuss the jury's deliberations.

My principal involvement with secrecy in connection with the *Rahman* case involved a statute called the Foreign Intelligence Surveillance Act, commonly known as FISA.[3] Fortunately, it is probably one of the least known statutes on the books. The statute creates a FISA court that is comprised of seven judges from seven separate circuits around the country who convene in order to hear applications for government surveillance of foreign intelligence activities.[4] These activities can include terrorist activities that could

---

[2] United States v. Rahman, 861 F. Supp. 247 (S.D.N.Y. 1994), *aff'd*, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 830 (2000); *see also* Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. TIMES, Jan. 18, 1996, at A1 (reporting that Abdel Rahman and nine others planned a "day of terror" on which five bombs were to blow up the United Nations Building, the Lincoln and Holland Tunnels, the George Washington Bridge, and the main federal office building in Manhattan).

[3] 50 U.S.C. §§ 1801-1811 (1994 & Supp. IV 1998).

[4] *Id.* § 1803(a). Section 1803(a) announces that seven district court judges appointed by the Chief Justice of the United States "shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States." *Id.* Where a judge denies any such application, such judge must promptly elucidate in writing his or her reasons for doing so. *Id.* Such writing "shall be transmitted, under seal, to the court of review." *Id.* The reviewing court consists of three judges from the district courts and courts of appeals as appointed by the Chief Justice of the

have an impact on United States citizens or resident aliens. If warrants are granted, an appeal can be taken to an ad hoc appellate court, comprised, I am happy to say, of three other judges from three other circuits.[5]

The information that is obtained in that kind of surveillance is only for the purpose of conducting foreign intelligence and protecting the security of the United States. That kind of intelligence, however, can involve criminal activity, and when that criminal activity is subsequently prosecuted, the government has the opportunity to disclose what it has detected and the ability to use some of it in court. That process should permit defendants to challenge the validity of the surveillance itself. Defendants have a difficult time challenging such evidence because they do not have access to either the application or the supporting material. Thus the defendant reluctantly relies principally on the court to conduct an examination of the underlying documentation in order to assure that there was probable cause to believe that the proposed surveillance would yield appropriate information and that certifications were obtained.

The court is permitted under FISA to let defendants see some or all of the application to help them make their arguments.[6] I did not, however, find that necessary and I am unaware of any other court that has. It bears emphasis that the statute does not indicate whether the information discovered from surveillance is admissible at trial. As a result, I believe the matter is principally covered by the traditional rules of evidence. Nor does the statute mention how evidence that is beneficial to the defendants should be considered by the court. Thus the judge is in an anomalous position. The judge

---

United States. *Id.* § 1803(b).

[5] *Id.* § 1803(b). If the reviewing court deems the application properly denied, then it, too, shall enumerate in writing its reasons therefor. *Id.* Upon any successful petition for certiorari, "the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision." *Id.*

[6] *Id.* § 1806(f). "[T]he court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is neccessary to make an accurate determination of the legality of surveillance." *Id.*

is forced not only to act as an arm of the prosecution in weighing the prosecution's arguments about whether disclosure would or would not compromise national security, but also to act as a defense lawyer in determining whether the information is useful to the defendant. This is certainly a difficult task, particularly before trial, and it must be accomplished in a continuous fashion during the trial to assure that no vital evidence is overlooked. Although it is a rough and ready way to balance the paradox facing the judicial system, the alternative is either to have no surveillance at all or to have totally uncontrolled surveillance. Thus, the existing system is a compromise that Congress was forced to make.

There is another statute involving protection of classified information: the Classified Information Procedures Act ("CIPA"),[7] which can be applied at trial. When a party proposes that classified information be disclosed in the course of a trial, the government is permitted to go into court and try to either prevent the disclosure

---

[7] 18 U.S.C. app. §§ 1-16 (1994 & Supp. IV 1998). CIPA allows any party post-indictment to seek a conference in order to evaluate potential issues that may arise during the course of a prosecution relating to classified information. *Id.* § 2. A district court is required to issue a protective order preventing a defendant from examining any classified information upon motion by the United States. *Id.* § 3. As a result, a defendant may only seek access to redacted materials or summaries of information prepared by the United States. *Id.* § 4. The court, moreover, may examine any classified documents *in camera* upon request by the United States. *Id.* If the information is kept confidential, it shall be held under seal and made available only to an appellate court. *Id.*

In the event that a defendant "reasonably expects to disclose . . . classified information," he must notify the United States and supply a brief synopsis of such evidence. *Id.* § 5. Interlocutory appeals are generally permitted. For example, any appeal pursuant to a CIPA disposition "shall be expedited by the court of appeals." *Id.* § 7. In the event of an appeal during a trial, the trial court must adjourn its proceedings until the appeal is decided by the court of appeals. *Id.*

Where classified information is to be introduced as evidence, the district court must take appropriate precautions. *Id.* § 8. Such precautions include providing the court with proffers of a witness' response to a line of inquiry or question. *Id.* § 8(c). A court, moreover, may only allow portions of writings, photographs, or recordings into evidence. *Id.* § 8(b). Furthermore, the trial court must implement certain security procedures to guard against the disclosure of any classified information. *Id.* § 9.

of that secret information, or at least restrict the disclosure to summaries or to sanitized versions so as not to compromise national security. The ultimate price the government could pay for blocking disclosure is dismissal of an indictment. That is rare, however.

As I stated before, CIPA was applicable only to a limited extent in the terrorism case I presided over. In that case, there was no concealment relating to the filing of charging instruments. There was at least one confidential proceeding relating to a witness in which the witness' safety was threatened.[8] This proceeding went up to the court of appeals.[9] To my knowledge, none of the four judicial officers involved in that proceeding ever suggested that it be open. If the proceeding had been opened, it would have been at a risk to the witness' life. Thus, that was the only completely closed matter in that case, other than the identity of the jurors, which remained closed due to the restraint of the press.

---

[8] *Rahman*, 861 F. Supp. at 251 (rejecting a FISA disclosure challenge and ruling that "the motions will be decided with the submitted material *in camera*"). For an interesting application of CIPA, see *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1996). In *Wilson*, the defendant was indicted by a Grand Jury for shipping explosives to Libya and for witness tampering, among many other charges. *Id.* at 8. Defendant insisted upon the opportunity to testify in detail about classified counterintelligence activities he allegedly undertook on behalf of the United States. *Id.* An *in camera* hearing was held to examine the proffered evidence. Relying upon both section five of CIPA and Rule 403 of the Federal Rules of Evidence, the district court refused to allow defendant to testify as to such matters. *Id.* at 9. The Second Circuit found no constitutional transgression.

[9] United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

Mary Jo White[*]

I have been assigned to act in a role today which is easy, and I will speak about my perspective, a prosecutor's perspective, of the importance of secrecy, particularly in terrorism trials and investigations.

I will begin with what is really obvious: from a prosecutor's point of view, it is hard to imagine a category of criminal cases of greater gravity than those involving international terrorism. Crimes of international terrorism often involve the mass murder or plots of mass murder of hundreds of innocent citizens. We are all familiar with the bombing of the World Trade Center on February 26, 1993.[1] Since that jarring crime, the Federal Bureau of Investigation, the New York Police Department, the Joint Terrorist Task Force in New York,[2] the Southern District of New York's United States Attorney's Office, and the courts of the Second Circuit have been continuously and actively involved in investigations, prosecutions, trials and appeals of allegations, events and cases involving international terrorism.

Because I believe it is worth the time, I would like to discuss very briefly the related cases that followed the World Trade Center case. In addition to the World Trade Center bombing itself, there was the so-called "Day of Terror Plot" that Judge Mukasey presided over.[3] In this terrorism plot, at least a dozen terrorists planned in 1993 to blow up the Lincoln and Holland Tunnels, the George Washington Bridge, the United Nations, and 26 Federal

---

[*] United States Attorney for the Southern District of New York.

[1] George J. Church, *The Terror Within*, TIME, July 5, 1993, at 22; *see also* Richard Lacayo, *Tower Terror*, TIME, Mar. 8, 1993, at 24 (recounting the World Trade Center bombing events).

[2] Benjamin Weiser, *Appellate Court Backs Conviction in '93 Terror Plot*, N.Y. TIMES, Aug. 17, 1999, at A1. The Joint Task Force is an organization comprised of the New York City Police Department and the Federal Bureau of Investigation charged with investigating terrorist activities and apprehending those who commit and plot to commit terrorist acts. *Id.*

[3] United States v. Rahman, 861 F. Supp. 247 (S.D.N.Y. 1994).

Plaza, which houses the New York FBI office.[4] In another terrorism case, Ramzi Ahmed Youssef, one of the alleged masterminds of the World Trade Center bombing, plotted in 1994-95, while he was a fugitive, to destroy a dozen American jumbo jets flying back from the Far East in a single forty-eight hour period.[5] The most recent pending terrorist case deals with the bombings of our embassies in East Africa in August 1998.[6] More than two hundred twenty totally innocent African and American citizens were killed in those two, nearly simultaneous bombings.[7]

In other western nations, more permissive rules apply to those accused of terrorist crimes.[8] In the United States, we have all of the safeguards of the Constitution, the rules of criminal procedure, and the rules of evidence, which are fully applicable to defendants accused of terrorist crimes who are tried in American courtrooms. I believe that the United States' judicial system is a model of how terrorist crimes should be prosecuted. We should not lower the bar

---

[4] *See generally* Joseph P. Fried, *Prosecution Rests Case in a Trial on Terrorism*, N.Y. TIMES, June 29, 1995, at B2; Weiser, *supra* note 2, at A1.

[5] *See generally* Tom Carter, *FBI Unit to Probe Pakistan Shooting; 2 Americans Slain in Attack on Van*, WASH. TIMES, Mar. 9, 1995, at A17; Mark Mathews & Tom Bowman, *Terror Strikes the Heartland*, BALT. SUN, Apr. 20, 1995, at 16A.

[6] *See generally* James Risen, *After the Attack: The Overview; Blast Suspect Held in U.S. and Is Said to Admit Role*, N.Y. TIMES, Aug. 28, 1998, at A1.

[7] *Id.*

[8] *See* Gregory C. Clark, Note, *History Repeating Itself: The (D)evolution of Recent British and American Antiterrorist Legislation*, 27 FORDHAM URB. L.J. 247, 254 (1999) (comparing the approaches of American and British legislation to combat terrorism and noting that British law gives authorization to detain terrorist suspects for questioning without trial). A suspect can be detained "for an initial period of forty-eight hours, which can then be extended to an additional five days . . . all without formal charges or an appearance before a magistrate." *Id.* at 254-55. *See also* Jacqueline Ann Carberry, Comment, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 688 (1999) (contrasting American and British legislation and noting that the European Court of Human Rights has expressed that allowing individuals to be detained for potentially long periods without a court appearance violates the European Convention on Human Rights); Venkat Iyer, *States of Emergency - Moderating Their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 139 (1999) (discussing the British government's view that long detentions prior to judicial review are necessary to successfully investigate terrorist crimes).

of our criminal justice system when it is invoked to deal with the very serious crimes of terrorism. If we did lower the bar, we would be bowing to that particular type of crime and diluting our own fundamental principles of fairness and due process.

Instead, the Constitution is the basis for our entire criminal justice system. The Constitution guarantees several safeguards to protect the accused from unfair judicial proceedings. One of the most fundamental safeguards of our criminal justice system is the presumptive right accorded by the First Amendment to public access to criminal proceedings once charges are filed.[9] The Sixth Amendment provides an additional safeguard to a defendant.[10] It guarantees the accused the right to a public trial in which the government must prove its case.[11] Finally, prior to indictment,[12] the accused as well as witnesses benefit from another fundamental

---

[9] U.S. CONST. amend. I. In relevant part, the First Amendment commands that "Congress shall make no law . . . abridging the freedom . . . of the press." *Id. See* Press-Enterprise v. Superior Court, 478 U.S. 1, 12 (1986) (observing that "public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system") [hereinafter *Press-Enterprise II*]; Waller v. Georgia, 467 U.S. 39, 48 (1984) (holding that the closure of an entire suppression hearing lasting seven days was unjustified in light of the scant privacy interests advanced by the state); Press-Enterprise v. Superior Court, 464 U.S. 501, 510 (1984) (stating that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest") [hereinafter *Press-Enterprise I*].

[10] U.S. CONST. amend. VI.

[11] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

[12] The Fifth Amendment affords defendants another safeguard: it requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

safeguard: the requirement that grand jury proceedings be held in secret.[13]

In international terrorism cases, certainly the ones I have been involved in, these opposing safeguards of openness and secrecy most often operate simultaneously. Even after public criminal proceedings are commenced, extensive and rapidly moving secret grand jury investigations of additional charges and additional potential defendants actively continue, very often long after indictment and even after the first series of criminal trials is completed. Thus, secrecy is essential to preserving the integrity of ongoing terrorism investigations and the safety of those providing information to the grand jury and the government.

As a result, you can and should expect prosecutors to zealously safeguard the secrecy that protects those very compelling interests. The First Amendment allows that secrecy to occur. There is, of course, no First Amendment right of access to grand jury proceedings. Even after the First Amendment comes into play, when some charges are filed, access and openness are qualified rights.[14] These rights may be compromised when the defendant's Sixth Amendment right to a fair trial is judged paramount.[15] They may also be compromised by a compelling government interest in preserving grand jury secrecy, the integrity of ongoing investigations, confidential intelligence-gathering activities, or the safety of witnesses, defendants, and their families.

Government lawyers, in addition to being bound by the dictates of the First Amendment, are also bound by regulation to safeguard

---

[13] FED. R. CRIM. P. 6(e)(2). Rule 6(e)(2), in relevant part, requires that a person "shall not . . . disclose matters occurring before the grand jury." *Id. See also* Barnett v. Dillon, 890 F. Supp. 83, 88 (N.D.N.Y. 1995) (stating that federal grand jury proceedings are to be kept secret absent a "showing of particularized need").

[14] *See Press-Enterprise II*, 478 U.S. at 15 (stating that "[i]f the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches," but "even when a right of access attaches, it is not absolute") (citation omitted); *Press-Enterprise I*, 464 U.S. at 509 (noting that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness") (footnote omitted).

[15] U.S. CONST. amend. VI.

the vital public interest in the openness of judicial proceedings.[16] But in international terrorism cases, prosecutors are extremely solicitous and protective of the countervailing interests that can and do justify closure, sealing and other permissible avenues of secrecy. In many situations, the prosecutor will conclude and argue for complete closure, even including, at times, the deferral of notice and docketing until the compelling countervailing interests can be adequately safeguarded.

Now, to be sure, several Second Circuit decisions[17] and United States Supreme Court decisions[18] suggest that such extensive closure measures should be very rare. It is precisely in cases of international terrorism, however, that the necessarily high and rigorous showing is very likely to be met, or most likely to be met. As Judge Mukasey has stated, other special secrecy procedures exist that do not just apply in terrorism cases, but typically do come into play in terrorism cases. The Classified Information Procedures Act and the Foreign Intelligence Surveillance Act are sets of procedures designed to protect important national security interests against such threats as international terrorism.[19]

Today, I have attempted to briefly describe the context of international terrorism investigations and trials from a prosecutor's perspective. It is a perspective, I recognize, that is viewed by many

---

[16] Section 50.9 of the Federal Register, for example, seeks to safeguard our valuable First Amendment protections. 28 C.F.R. § 50.9 (2000). It instructs government attorneys to "ordinarily oppose closure" of the courtroom. *Id.* It also makes clear that the government must petition for closure "only when [it] is plainly essential to the interests of justice." *Id.*

[17] *See, e.g.*, Bobb v. Senkowski, 196 F.3d 350, 353 (2d Cir. 1999) (holding that in order for a state to justify courtroom closure for the duration of an undercover officer's testimony, it must demonstrate that such a measure is necessary to protect the identity and safety of the officer); Glaude v. Artuz, 189 F.3d 460 (2d Cir.1999), *cert. denied sub nom.* Dones v. Johnson, 120 S. Ct. 1428 (2000) (mem.) (scrutinizing the prosecution's proffered interests in sealing the courtroom during an undercover officer's testimony).

[18] *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 47 n.6 (1984) (noting that extensive pre-trial publicity is often cause for courtroom closure).

[19] Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (1994 & Supp. IV 1998); Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (1994 & Supp. IV 1998).

in the media and others as too secretive, and too closed to engender the public's confidence that the criminal justice system is always working as fairly as it should be in cases involving international terrorism.

Prosecutors and judges must be sensitive to the media and the public's right of access to the judiciary in international terrorism cases. Particular care does need to be taken to observe the procedural safeguards of access so that the media and the public are given notice when they are entitled to it, and can press for greater openness and more disclosure.

At the same time, however, what we would ask is that the media and the public recognize, and even try to accept, that the law protects and needs to protect the compelling countervailing interests that are so frequently present in international terrorism cases: national security; public safety; ongoing investigations; often involving ongoing terrorist plots; and witness safety. Very often, in terrorism cases, the law will strike a balance in favor of greater closure, sealing and secrecy. This may at times frustrate the media. But that, in my view, is a necessary and lawful price to pay.

"The history of liberty," Justice Frankfurter wrote, "has largely been the history of the observance of procedural safeguards."[1] The rights guaranteed by the First Amendment[2] are, in theory, at least, protected in no small part by elaborate procedural safeguards.[3] In the area of the First Amendment rights of the press and public for access to criminal proceedings, the Supreme Court and the Second Circuit have set out clear and detailed procedural requirements.[4] These procedural rules have been insufficiently enforced in New York's federal courts in recent proceedings involving allegations of international terrorism.

As a substantive matter, the press and public have a presumptive right of access to criminal proceedings.[5] Such proceedings may be closed to the press and public without violating the First Amendment only when three exacting requirements have been met. First, closure must serve a compelling interest. Second, there must be a substantial probability such that in the absence of closure, the compelling interest would be harmed. Lastly, it must be the case that there are no alternatives to closure that would adequately

---

* Senior Counsel, The New York Times Co.

[1] McNabb v. United States, 318 U.S. 332, 347 (1943).

[2] U.S. CONST. amend. I. In relevant part, the First Amendment commands that "Congress shall make no law . . . abridging the freedom . . . of the press." *Id.*

[3] *See, e.g.*, Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970) (explaining that courts have realized the important role of procedure in protecting freedom of speech and have "begun to construct a body of procedural law which defines the manner in which they . . . evaluate and resolve first amendment claims").

[4] *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982); United States v. Cojab, 996 F.2d 1404, 1408 (2d. Cir. 1993); *In re* Herald Co., 734 F.2d 93, 102 (2d Cir. 1984).

[5] Press-Enterprise v. Superior Court, 478 U.S. 1, 11 (1986) [hereinafter *Press-Enterprise II*]; Press-Enterprise v. Superior Court, 464 U.S. 501, 505 (1984) [hereinafter *Press-Enterprise I*]; *Globe Newspaper*, 457 U.S. at 605; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

protect that compelling interest.[6] In other words, "[w]here the State attempts to deny the right of access [to the courtroom and legal papers] in order to inhibit the disclosure of sensitive information," the Supreme Court requires that such denial be "necessitated by a compelling government interest . . . narrowly tailored to serve that interest."[7]

These standards are presumptive; they are not absolute. As a result, decisions on whether proceedings are to be open or closed are the subject matter of litigation. Access litigation is unusual in at least two ways: (i) the opponent of closure is often not a party to the proceeding and thus uninformed; and (ii) open argument on the question of closure might itself disclose what arguably ought to be kept secret. Without appropriate procedural rules to address these anomalies, the substantive access right could seldom be vindicated. At the other extreme, the interests requiring secrecy could never be protected. As the Supreme Court stated in *Globe Newspaper Co. v. Superior Court*, "for a case-by-case approach to be meaningful, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion."[8] Trial courts, however, must have discretion to safeguard the matters sought to be closed. Otherwise, the interest at issue "would be defeated before it could ever be brought to bear."[9]

The Supreme Court and the Second Circuit have fashioned three basic procedural requirements to address these issues. In order to properly safeguard the First Amendment interests of both the press and public at large, these procedural mandates must be rigorously adhered to.

---

[6] *Press-Enterprise II*, 478 U.S. at 14; *Press-Enterprise I*, 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 581.

[7] *Globe Newspaper*, 457 U.S. at 607.

[8] *Id.* at 609 n.25 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The full sentence from Justice Powell's concurrence reads as follows: "If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion." *Gannett*, 443 U.S. at 401.

[9] *Globe Newspaper*, 457 U.S. at 609 n.25.

I. PROCEDURAL REQUIREMENTS

A. Notice

Notice to the press and public is one necessary requirement that must be met in order for a proceeding to be kept secret. The Supreme Court has not considered the form such notice must take beyond some remarks by Justice Powell in his concurrence in *Gannett Co. v. DePasquale*.[10] Justice Powell would not require notice to anyone except those present in the courtroom at the time the motion for closure is made.[11] It apparently did not occur to him – as is relatively common practice in the Southern District of New York – that the closure motion itself could be made in a closed courtroom proceeding in which the very docket sheet is sealed. Justice Powell reasoned that "the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public."[12]

The Second Circuit requires more. Recognizing that "it seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public-spirited citizen willing to complain about closure," it held that "[s]ome form of public notice should be given, since it is important, perhaps especially so, to afford an opportunity to challenge courtroom closure accomplished in the absence of spectators."[13] Prompt docketing of the closure motion, papers supporting and opposing the motion, the time and place of the resulting hearing, the occurrence of the hearing, the disposition of the motion and the fact of courtroom closure are all required, "normally on the day the pertinent event occurs."[14]

---

[10] 443 U.S. at 401.

[11] *Id.* (opining that the opportunity to be heard "extends no farther than the persons actually presented at the time the motion for closure is made").

[12] *Id.*

[13] *In re* Herald Co., 734 F.2d 93, 102 (2d Cir. 1984).

[14] *Id.*; *see also* United States v. Cojab, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that the order of the district court sealing the hearing room records must be vacated where the order was decided in the judge's robing room and the

Such notice through docket entries represents a minimum. There is nothing wrong with doing more, "such as notification to one of the news media, or perhaps to one attorney in those areas where substantial agreement can be achieved as to the appropriate recipient of such notice."[15] Another simple option not noted by the Second Circuit is the posting of notices of closure motions in the courthouse press room. All of these procedures work smoothly in other jurisdictions.[16]

The Second Circuit, however, does note two caveats. Echoing Justice Powell, it recognizes that "notice requirements must remain sufficiently flexible to accommodate the exigencies of the litigation process and avoid unwarranted delays."[17] It also takes account of "extraordinary situations where even the contemporaneous notation in the docket that courtroom closure has been sought or has occurred could create a substantial risk of harm to an individual."[18] Even here, the trial court may order a delay of docketing for only "some brief interval, provided that the interval ends upon a specified date or the occurrence, within a reasonable time, of a specified event and that the judge's reasons for delaying docketing are set forth, under seal if appropriate, for eventual appellate scrutiny."[19] This unusual procedure must only be used where the threat to an individual's safety is a significant risk *beyond* the risk

---

notice that the hearing would be closed and its records sealed was not docketed until a month after the hearing).

[15] *In re Herald*, 734 F.2d at 103.

[16] *See, e.g.*, *In re* Knight Publ'g Co., 743 F.2d 231, 234 (4th Cir. 1984) (requiring that "when the district court has been made aware of the desire of specific members of the public to be present, reasonable steps to afford them an opportunity to submit their views should be taken before closure"); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 8 (Fla. 1982) (holding that notice must be given to at least one member of the local media).

[17] *In re Herald*, 734 F.2d at 102.

[18] *Id.* at 102 n.7. The sole example offered is the docketing of a closure order on the eve of a multi-defendant trial that "might indicate that one defendant had been granted immunity *in camera* in anticipation of his testifying against the other defendants, an inference that could endanger the witness." *Id.*

[19] *Id.*

arising from the publication of information in newspaper articles that has already occurred.[20]

B. *Public Hearings and Findings of Fact*

The second procedural requirement is a public hearing.[21] The case law suggests that oral argument is required prior to shutting down access to the courtroom and relevant documents.[22] Courts in the Second Circuit, moreover, have vacated closure orders where they were not made in open court.[23] The third procedural requirement is the preparation of detailed findings of fact justifying such closure as is determined to be necessary in order to allow meaningful appellate review.[24] The Second Circuit has, on occasion, vacated closure orders for insufficient specificity.[25]

A district court "may, where appropriate, put the contents of its decision under seal," though "the fact that a sealing order has been entered must be docketed."[26] The Second Circuit is thus relatively casual in allowing the sealing of such judicial decisions. The district courts of the Seventh Circuit, on the other hand, are subject to much more rigorous requirements, as established by Judge Easterbrook's statement in a chambers opinion:

---

[20] *Id.* at 101 (emphasis added).

[21] United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988).

[22] *See, e.g.*, United States v. Cojab, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a closure motion must be decided "in open court"); United States v. Doe, 27 Media L. Rep. (BNA) 1731, 1733 (S.D.N.Y. 1999) (requiring a public hearing including oral arguments).

[23] *Cojab*, 996 F.2d at 1408 (holding that where an order sealing hearing records is "not decided in open court . . . it must be vacated"); *Doe*, 27 Media L. Rep. (BNA) at 1732-33 (stating that failure to follow the "extremely important" procedural requirement of "public hearing on the closure motion" requires vacatur remedied by subsequent briefing and oral argument).

[24] *Press-Enterprise II*, 478 U.S. 1, 15 (1986) (holding that the First Amendment right of access cannot be overcome by "conclusory assertion"); *In re* Herald Co., 734 F.2d 93, 100 (2d Cir. 1984) (stating that the trial judge must articulate a sufficiently detailed basis for any closure order).

[25] *See, e.g.*, *In re* The New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987); *Haller*, 837 F.2d at 87.

[26] *Haller*, 837 F.2d at 87.

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.[27]

A separate Seventh Circuit panel raised the same concern regarding the specific question of sealing closure orders. Judge Ripple, writing for the court, explained that

> [a]lthough redaction of part of the explanation [for closure or sealing] might be justified in some circumstances, the use of such an awkward device ought to be invoked in only the most unusual of situations. Sealing of the entire explanation would indeed be an extraordinary step for a district court to take, given the heavy burden it would place on the Press and, indeed, on the appellate court in its later evaluation of the appropriateness of such action.[28]

II. PROCEDURE IN NATIONAL SECURITY CASES

All three procedural requirements enumerated above must be followed even, and perhaps especially, where the interest asserted in favor of closure is national security or the safety of foreign informants and American citizens. In *In re Washington Post Co.*, the Fourth Circuit considered a plea agreement involving a Ghanian citizen accused of espionage.[29] The defendant was alleged to have obtained classified information concerning other Ghanians who covertly worked for the Central Intelligence Agency, American covert personnel in Ghana, and Ghanian dissident activity and military aid from other nations to Ghana.[30] As part of the plea agreement, the defendant was to be exchanged for persons held in

---

[27] *In re* Krynicki, 983 F.2d 74, 75 (7th Cir. 1992).

[28] *In re* Associated Press, 162 F.3d 503, 510 (7th Cir. 1998) (footnote omitted).

[29] 807 F.2d 383, 391 (4th Cir. 1986).

[30] *Id.* at 386.

Ghana on charges of spying on behalf of the United States.[31] The parties jointly moved for closure of the plea hearing.[32]

The Fourth Circuit held that the three procedural requirements outlined above were applicable:

> We note further that, troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions.
>
> A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse. Accordingly, we hold that the procedural requirements . . . are fully applicable in the context of closure motions based on threats to national security.[33]

Although the public and the press presumptively "enjoy a free right of access to criminal proceedings," this right "is not absolute and in certain circumstances it may give way to other important rights or interests."[34] The *Doe* cases, described below, illustrate the difficulties that New York's federal courts have encountered in applying the detailed procedural requirements set out by the Su-

---

[31] *Id.*

[32] *Id.*

[33] *Id.* at 391-92; *accord* United States v. Doe, 27 Media L. Rep. (BNA) 1731, 1733 (S.D.N.Y. 1999) (stating that the court agrees "with the *Times* that these procedural requirements are mandated and remain extremely important where the interest advanced as the basis for closure involve questions of national security").

[34] *Doe*, 27 Media L. Rep. (BNA) at 1732 (citing *Press-Enterprise II*, 478 U.S. 1, 1 (1986)).

preme Court and the Second Circuit for reviewing a challenge to a sealing order in a criminal terrorism proceeding.[35]

A. *Doe I*

On September 11, 1998, a closed criminal proceeding, captioned *United States v. Doe (Doe I)*,[36] was held before Magistrate Judge Andrew J. Peck in the Southern District of New York. The next day, *The New York Times* reported:

> Federal authorities in Manhattan charged another suspect yesterday in a continuing investigation into terrorism in the wake of the bombings last month of the United States embassies in Kenya and Tanzania.
>
> The suspect, whose identity was not disclosed, was taken before a Federal magistrate judge in Manhattan late in the afternoon for a closed court proceeding. Reporters and other were asked to leave the courtroom, and the magistrate, Andrew J. Peck, said afterward that the record would remain sealed.
>
> Magistrate Peck refused to explain why he had sealed the case, and it was not clear who had sought the secrecy, whether either the prosecution or the defense objected, or what the charges were.[37]

On October 30, 1998, in a long front-page article, *The Times* reported that the suspect's name was Ali A. Mohamed.[38] The article described Mr. Mohamed's varied efforts on behalf of and in opposition to the United States.[39]

---

[35] *Id.*

[36] 98 Mag. 2332 (S.D.N.Y. Jan. 15, 1999) [hereinafter *Doe I*] (on file with the *Journal of Law and Policy*).

[37] Benjamin Weiser, *In Manhattan, Third Suspect Is Held in Embassy Bombings*, N.Y. TIMES, Sept. 12, 1998, at D12.

[38] Benjamin Weiser, *U.S. Ex-Sergeant Linked to bin Laden Conspiracy*, N.Y. TIMES, Oct. 30, 1998, at A1.

[39] *Id.* The article describes Ali A. Mohamed as an honorably discharged Army sergeant who handled clerical work and instructed soldiers about Islamic culture. Mr. Mohamed, a native of Egypt, was well versed in four languages and had served as an officer in Egypt for thirteen years prior to coming to the United States in 1985. Mr. Mohamed's description as a good citizen was undermined by

A few days later, *The Times* wrote to Magistrate Peck about the action against Mr. Mohamed. *The Times* noted that "every aspect of the proceeding has been sealed" and asked for the docket number, docket sheet, sealing order and other materials "ordinarily available even in cases warranting substantial secrecy."[40] By order dated November 13, 1998, Magistrate Judge Peck provided the caption (albeit a "John Doe" caption) and docket number, but nothing more.[41] He wrote: "If the *Times* (or any other news organization) seeks to challenge the sealing order(s) in 98 Mag. 2332, it should proceed by formal motion before me (or the Part I District Judge)."[42] Thus, two months passed before the press and public were able to obtain the title and docket number of the action. The docket itself remained sealed.

On December 4, 1998, *The Times* moved to unseal the proceedings. With the consent of both parties, Judge Shira A. Scheindlin (the Part I district court judge) promptly ordered the clerk of the court to disclose the docket and "to ensure that the docket reflects the existence of any sealed proceedings, sealed orders or other sealed filings in this case, without revealing the names of any parties, other than the United States."[43] Thus, three months passed before the press and public were able to inspect

---

accusations that he traveled from his station at Fort Bragg, North Carolina to New York in 1989 to train Islamic militants to fight against the Soviet Union in Afghanistan. Because Mr. bin Laden's associates, particularly those terrorists accused of bombing American embassies in East Africa, were notorious for fighting in the Islamic holy war against the Soviet Union in Afghanistan, the claim was that Mr. Mohamed linked himself to bin Laden's dangerous terrorist network through his past military training in 1989 of these very same rebels, now terrorists. Furthermore, a defendant among those charged in 1995 with plotting to blow up New York's landmarks claimed that Mr. Mohamed was instead part of a covert American operation to train and arm Afghan rebels fighting the Soviet Union. *Id.*

[40] Letter from Mr. Adam Liptak, Senior Counsel, The New York Times Co., to Magistrate Judge Andrew J. Peck of the Southern District of New York (Nov. 3, 1998) (on file with the *Journal of Law and Policy*).

[41] *Doe I*, 98 Mag. 2332 (S.D.N.Y. Nov. 13, 1998) (on file with the *Journal of Law and Policy*).

[42] *Id.*

[43] *Doe I*, 98 Mag. 2332 (S.D.N.Y. Dec. 9, 1998) (on file with the *Journal of Law and Policy*).

even the docket sheet in a criminal proceeding concerning issues of grave public importance.

The public notice requirement is meant to be, and by its nature must be, self-executing. Yet only because *The Times* happened to learn of the closed proceeding and chose to pursue the matter did the docket become publicly available. It is, of course, theoretically required to be open from the start. One cannot know how many other similar proceedings have been heard or are being heard in total secrecy.

On January, 15, 1999, Judge Scheindlin issued an oral order. She framed the procedural issues this way:

> The Times first argues that procedural irregularities in the original sealing order justify its vacatur. In particular, it argues that because the docket sheet in this case remained sealed for approximately three months, a problem which the government attributes, in part, to clerical error, there was inadequate public notice of closure; and it argues that there was a lack of public hearing on the closure motion. In addition, being unable to review the sealing order, which itself is under seal, The Times questions whether the order contains detailed findings of fact that would be sufficient to allow review by a superior court.[44]

Judge Scheindlin vacated the original sealing order and then simultaneously reimposed it. She concluded:

> Due to the procedural defects, I vacate the original order placing these proceedings under seal. Given my determination, however, that there are compelling interests justifying closure of this case at this time, I find that these violations do not require the unsealing of this proceeding, and I therefore simultaneously reimpose a new order sealing all proceedings and filings in this case with a few exceptions . . .
>
> The public has now been provided with adequate notice of the existence of the sealed proceedings, and The Times has

---

[44] United States v. Doe, 27 Media L. Rep. (BNA) 1731, 1732 (S.D.N.Y. 1999) (citation omitted).

> been given the opportunity before this court to challenge the closure through briefing and oral argument.[45]

As a substantive matter, Judge Scheindlin went on to opine that the asserted interests sufficient to justify closure posed "a significant probability of harm to compelling interests, including the preservation of grand jury secrecy, the government's interest in pursuing ongoing criminal investigations and the safety of sources related to such investigations."[46]

Subsequently, Judge Scheindlin unsealed nine documents relating to the litigation of the access motion, none of which contained any substantive information. Judge Scheindlin, however, undertook an ongoing role for the court in an attempt to protect the First Amendment rights of both the press and public. As a result, Judge Scheindlin ordered that "the government and the defendant submit all future sealed filings in this case for *in camera* review and determination as to whether they should remain sealed."[47]

On the available information, there is little to quarrel with in Judge Scheindlin's decision except, perhaps, with her coyness about the identity of the defendant. The government, in a public brief supplemented by a sealed affirmation (which would seem to be the appropriate procedure),[48] argued that "judicial confirmation of

---

[45] *Id.* at 1733.

[46] *Id.*

[47] *Id.* The court ultimately released a number of the documents *The Times* had sought. *See* Benjamin Weiser, *Indicated Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. TIMES, June 5, 1999, at A3 (reflecting information from documents unsealed following indictment of Ali A. Mohamed); Benjamin Weiser, *U.S. Charges Ex-Soldier, Calling Him a Plotter with bin Laden*, N.Y. TIMES, May 20, 1999, at A12 (describing information revealed in conjunction with the indictment of Ali A. Mohamed).

[48] *See In re* Krynicki, 983 F.2d 74, 76 (7th Cir. 1992).

> Public argument is the norm even, perhaps especially, when the case is about the right to suppress publication of information. Briefs in the Pentagon Papers case, *The New York Times Co. v. United States*, 403 U.S. 713 (1971), and the hydrogen bomb plans case, *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), were available to the press, although sealed appendices discussed in detail the documents for which protection was sought.

Id.

[Mr. Mohamed's identity] would convert the anonymous whisper into hard information."[49] There may well be cases in which judicial conformation of a newspaper's reporting could do separate harm to the national security, people's safety or other interests. It is hard to imagine, though, the terrorist, spy or co-defendant who awaits judicial confirmation of a defendant's identity before taking action, where the defendant has been identified by name in detailed front-page news reporting in *The Times*.

B. Doe II

On January 3, 2000, a closed proceeding, captioned *United States v. Doe* (*Doe II*), was held before Magistrate Judge Michael H. Dolinger of the Southern District of New York.[50] *The New York Times* reported:

> Two Algerians, one in Brooklyn and the other in Seattle, have been arrested in the continuing investigation of a terrorist bomb plot. The new arrests came amid indications that federal authorities are focusing their efforts on a network of Algerians in New York, Seattle and Boston, officials said yesterday.
>
> The Brooklyn man, Abdelwaheb Hamdouche, was taken into custody Saturday night at Kennedy International Airport as he was preparing to leave for Paris on a KLM flight, officials said. Mr. Hamdouche, 34, a naturalized French citizen, was held as a material witness in the bomb plot investigation, and it is believed that he was ordered to remain in custody after a closed hearing yesterday in Federal District Court in Manhattan. . . .
>
> After yesterday's closed hearing, neither a federal prosecutor, David N. Kelley, nor Mr. Hamdouche's lawyer, Mitchell A. Golub, would comment or even describe the proceeding.

---

[49] Brief for the United States of America at 12, *Doe I*, 98 Mag. 2332 (S.D.N.Y. Jan. 13, 1999) (on file with the *Journal of Law and Policy*).

[50] 2000 Mag. 3 (S.D.N.Y. Feb. 25, 2000) [hereinafter *Doe II*] (on file with the *Journal of Law and Policy*).

> A federal magistrate judge, Michael H. Dolinger, refused a request by The New York Times to open the session, and afterward, he would not say why he had conducted it in secret. . . . No one would say if Mr. Hamdouche had been ordered held, but he did not leave the courtroom with his defense lawyer as the hearing ended.[51]

Four days later, *The Times* wrote to Magistrate Judge Dolinger seeking "compliance with the procedural requirements mandated by a series of Second Circuit decisions concerning the First Amendment access rights of the press and public to criminal proceedings: notice (in the form of docketing), an opportunity to be heard and factual findings justifying any closure."[52] Three days after that, Magistrate Judge Dolinger issued an order in response, stating that: "[i]f The New York Times wishes to seek an unsealing order, it may do so by service and filing of a formal motion."[53] Magistrate Judge Dolinger declined to unseal the docket on the strength of a letter application. Instead, he insisted on compliance with procedural niceties even as he declined to comply with procedural requirements mandated by the First Amendment.

On January 13, 2000, *The Times,* the *Daily News*, and *Newsday* made a formal motion for access. In *Doe I*, the parties had filed only portions of their opposition papers under seal. In *Doe II*, all opposition papers were filed entirely under seal, and the judge declined the newspapers' request for redacted versions. On this point, the court ruled:

> We have also considered the request of movants for access to a sanitized version of the opposition papers filed by the parties to the sealed proceeding. We have declined to direct those parties to undertake such an editing job since it is difficult to see how the papers can be redacted to eliminate all confidential information while still preserving

---

[51] Benjamin Weiser, *Two New Arrests in Investigation of Bomb Plot*, N.Y. TIMES, Jan. 4, 2000, at B1.

[52] Letter from Mr. Adam Liptak, Senior Counsel, The New York Times Co., to Magistrate Judge Michael H. Dolinger of the Southern District of New York (Jan. 7, 2000) (on file with the *Journal of Law and Policy*).

[53] *Id.* Magistrate Judge Michael H. Dolinger issued an endorsed order, which was hand written upon the *Times'* letter application to him.

> enough coherence to make the documents a useful tool for movants. In any event, we are aware of the movants' legal position through their initial submission and can assess the merits of both sides' contentions without further briefing.[54]

This ruling tests the premises of the adversary system. The newspapers sought only an abstract statement of the interests asserted in favor of closure. Judge Scheindlin had informed *The Times* of the interests at stake in *Doe I*. It is at least conceivable that, on learning of the asserted interest, the newspapers could have directed the court to a body of law on any given point that the parties had failed to discuss and that the court had overlooked. The court also declined to hear oral argument.[55]

The Fourth Circuit has recognized that objections to closure in national security cases "will necessarily be abstract and uninformed."[56] "But their abstraction," the court correctly concluded, "will hardly render them valueless."[57] The Fourth Circuit candidly recognizes that "[e]ven abstract arguments will serve to remind the court of the importance of the interests that must be weighed against the government's interest in secrecy."[58] The *Doe II* court issued sealed and open versions of its decision. Before issuing the latter, it allowed the parties to inspect it and to propose further redactions. The parties apparently made no suggestions for further redaction, and certainly nothing of substance was revealed.

Even the discussion of the procedural lapses noted by the newspapers was largely relegated to the sealed decision. The court, for example, wrote:

> For reasons noted at some length in the sealed decision, we conclude that the procedures initially followed to decide whether to seal the case were permissible and in any event provide no basis for an unsealing order at this stage,

---

[54] *Doe II*, 2000 Mag. 3 at 6 n.3 (S.D.N.Y. Feb. 25, 2000) (on file with the *Journal of Law and Policy*).

[55] *Id.* at 2 n.2.

[56] *In re* Washington Post Co., 807 F.2d 383, 391 n.7 (4th Cir. 1986).

[57] *Id.*

[58] *Id.*

> particularly in view of the movants' current opportunity to address the substantive issues on their motion.[59]

The court credited only one of the newspaper's procedural arguments, conceding "that the failure to create a docket sheet for this matter, which is attributable to an apparent clerical error, should be corrected."[60] In this regard, the court admitted the following:

> To remedy this situation, we now directed the Clerk of the Court to redesignate this proceeding as a Miscellaneous matter with an appropriate docket number, and ensure that a docket sheet is created and publicly filed. In this manner, movants and other members of the public may learn of events that take place in this proceeding, whether court hearings or the filings of documents, and even if these matters are initially sealed, members of the public may take appropriate action to gain access to them.[61]

About two months passed between the closed hearing and the opening of the docket. It is virtually certain that even this minor step would not have been taken but for the litigation by the newspapers. The litigation itself could hardly have been less satisfying: the newspaper movants to this day have no inkling of the reasons proffered for closure and have had no opportunity to formulate responsive arguments. No hearing was ever had. Even the name of the subject of the proceeding, disclosed in the initial *New York Times* article and confirmed in a *Daily News* article reporting on Magistrate Judge Dolinger's decision,[62] remains secret.

---

[59] *Doe II*, 2000 Mag. 3 at 4 (S.D.N.Y. Feb. 25, 2000) (on file with the *Journal of Law and Policy*).

[60] *Id.* Recall that the discussions in *Doe* also blamed the clerk's office. United States v. Doe, 27 Media L. Rep. (BNA) 1731, 1732 (S.D.N.Y. 1999) (observing that "the docket sheet in the case remained sealed for approximately three months, a problem which the government attributes, in part, to clerical error").

[61] *Doe II*, 2000 Mag. 3 at 5 (S.D.N.Y. Feb. 25, 2000) (on file with the *Journal of Law and Policy*).

[62] Greg B. Smith, *Judge Won't Unseal Terrorist-Plot Case,* DAILY NEWS, Feb. 29, 2000, at 6.

The central problem with the two *Doe* cases does not lie in their results, which may have been correct. The problem is that it took months of litigation to enforce procedural requirements that are meant to be self-executing. The rights at stake are those of the public. And the public should not have to rely on a newspaper's decision to allocate resources to the vindication of the public's rights. The responsibility for the enforcement of the public's procedural rights is lodged with the judiciary itself, and, to some extent, with federal prosecutors. They have an institutional interest in maintaining an open system. Both *Doe I* and *Doe II*, and many similar cases, serve to underscore the importance of strictly adhering to court crafted procedural safeguards. Whatever the eventual results in these cases, the system failed in allowing these procedural rights to be ignored for months at a time.

Based on the lapses in these cases, the public cannot have complete confidence in the criminal justice system as it confronts cases involving international terrorism. "People in an open society do not demand infallibility from their institutions," Chief Justice Burger wrote twenty years ago, "but it is difficult for them to accept what they are prohibited from observing."[63]

[63] Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

I think a defendant rarely desires secrecy in criminal proceedings. First, I think it is very difficult to obtain secrecy. The only case I can remember where there was meaningful secrecy, and this is apart from a question of cooperators, was when John Gotti, Sr. was indicted in 1990[1] and a bail hearing was set before Judge Glasser. The concern was that the government wanted to play the Title III eavesdropping tapes[2] at the bail hearing. This occurred during the pre-O.J. Simpson days, when the press attention to the *Gotti* case was unprecedented. The concern was that the disclosure of the Title III tapes to the press, and the reporting of that material, would certainly pollute the defendant's right to a fair trial.

In order to avoid this potential bias, we made a motion for closure of the bail hearings. There was some precedent for closure of suppression hearings.[3] But, at that time there was no precedent for closure of a bail hearing. Judge Glasser, however, decided that closure was required. In considering closure, Judge Glasser applied

---

[*] Adjunct Professor of Law, Brooklyn Law School.

[1] *See* Selwyn Raab, *Gotti and 3 Top Aides Arrested on Federal Racketeering Charges*, N.Y. TIMES, Dec. 12, 1990, at A1.

[2] 18 U.S.C. §§ 2510-2520 (1994 & Supp. IV 1998). Title III of the Omnibus Crime Control and Safe Streets Act, which authorizes use of electronic surveillance for specified classes of crimes, represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Its purpose is "to prohibit, on pain of criminal and civil penalties, all interceptions of oral and wire communications except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with investigation of serious crimes listed in 18 U.S.C. § 2516." *Id.* § 2510(i)(4). *See also* United States v. Giordano, 416 U.S. 505, 514 (1974) (discussing the purpose of Title III).

[3] *See, e.g.*, Johnson Newspaper Corp. v. Hon. Glenn R. Morton, 862 F.2d 25, 29-30 (2d Cir. 1988) (explaining that the trial court's decision to close the courtroom during suppression hearings in light of a "strong likelihood of prejudice to the right of fair trial" in the absence of closure was appropriate under the circumstances).

the procedural rules the Supreme Court had set forth in cases like *Waller v. Georgia*[4] and *Press-Enterprise Co. v. Superior Court of California*,[5] and came out on the defense's side by ruling that the proceeding would be closed. In some rare cases the defense wants closure and will actually obtain it. Where the press is not present in the courtroom, who will protect the interests of the fourth estate? The answer seems to be the United States Attorney's Office. The Justice Department has a policy providing that, where a defense lawyer makes a motion for closure in a criminal case, the United States Attorney or the Assistant United States Attorney will vigorously oppose that motion, because the policy of the Justice Department is to insure open proceedings.[6]

In the case of a cooperator, the situation is different. Obviously, the lawyer representing the cooperator and the government lawyer both have a common interest in assuring that the proceedings be made public. Often, guilty pleas are entered upon a sealed transcript that is not released to the public for several weeks or perhaps several months after the fact. In such a case, it is true that

---

[4] 467 U.S. 39 (1984). In *Waller*, the Supreme Court set forth a four-factor test that courts must use to determine whether closure of the courtroom is necessary: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;" (2) "the closure must be no broader than necessary to protect the interest;" (3) "the trial court must consider reasonable alternatives to closing the proceeding;" and (4) the trial court "must make findings adequate to support the closure." *Id.* at 48.

[5] 478 U.S. 1 (1986) (holding that the qualified First Amendment right of public access, which generally attaches to preliminary hearings, can nonetheless be countermanded by specific, on-the-record findings demonstrating that there is a substantial probability that the accused's right to a fair trial will be prejudiced by publicity, that closure would prevent these dangers, and that reasonable alternatives to closure cannot adequately protect the accused's fair trial rights).

[6] The United States Department of Justice has stated that the mission of the Office of Information and Privacy is to "manage and coordinate the discharge of the Department of Justice's responsibilities under the Freedom of Information Act (FOIA) . . . within all Federal agencies and compliance with the Privacy Act within the Department of Justice." UNITED STATES DEPARTMENT OF JUSTICE, THE OFFICE OF INFORMATION AND PRIVACY, *available at* http://www.usdoj.gov/jmd/mps/mission.htm; *see also* Freedom of Information Act, 5 U.S.C. § 552 (1994 & Supp. IV 1998) (requiring that government agencies make information available to the public).

the press does not have an opportunity to invade the process. As a result, only in rare occasions will anyone be aware of the status of a particular case. Sometimes guilty pleas are literally entered into under the secrecy of night. For example, when Sammy "the Bull" Gravano[7] entered his guilty plea, it was actually a night session in the Eastern District of New York when everyone but the maintenance staff had exited in the building. Thus, in situations where the defense and the prosecutor argue for closure, it is very difficult for the press to relate that decision to the general public.

In addition, from a practical perspective, in cases where both the prosecution and the defense want closure for any number of reasons – matters disclosed at a sidebar that might influence the jury if it appears in the press, or concerns about third parties who are not part of the process and not part of the trial but where both sides want closure – a closed in-chambers proceeding or sidebar proceeding is held that is not made available to the public. Often, what happens is that a reporter in the courtroom will stand up and object to the closure as the parties are retreating to the chambers or the robing room. I can tell you that, even though some of our courthouse reporters are quite eloquent, they do not get very far. That is, there is no *Waller* analysis at that point.[8] I guess the danger from the perspective of the press is that they represent the lone voice of objection. As a result, it is very difficult for the press to win a motion objecting to closure.

Another area where closure is common is terrorism. Similar to the Supreme Court noting that death is different, terrorism is

---

[7] Salvatore Gravano, a.k.a. Sammy "the Bull," is a mafia informant and admitted hired killer who has testified in numerous mafia cases. *See* Greg B. Smith, *Sammy Banks on Feds: Gravano Expecting a Rescue*, DAILY NEWS, Mar. 7, 2000, at 8.

[8] *Waller*, 467 U.S. at 46 (noting that a public trial is beneficial to the defendant). In *Waller*, the Court explains that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* The Court's analysis, however, does not go further than to quote from *In re Oliver*, which holds that "the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* (citing *In re* Oliver, 333 U.S. 257, 270 n.25 (1948)).

different.[9] Different rules apply for different reasons in terrorism cases, but mostly for practical necessity.[10] The courts, thus, will continue to look at terrorism in a different light.

In situations that are more easily recognized by litigants, such as criminal cases, an undercover police officer still active in the vicinity in which he made the arrest does not want to testify in an open courtroom. Some fairly recent litigation in the Eastern and Southern Districts of New York has resulted in closure in such cases.[11] One of the key questions that courts entertain is whether less restrictive means can achieve closure, *i.e.*, should the judge *sua sponte* allow the placement of a screen in front of the witness or allow the witness to testify in a disguise? What defense lawyer on this earth would want a witness testifying against his or her client with a screen in front or a disguise? I do not believe this is a sensible procedure as it does not promote the idea of a fair trial. Unfortunately, the recent case law permits such means of closure.[12]

Judge Nickerson once granted habeas relief where family members of the defendant on trial were excluded, and where there was an insufficient finding that the witness was concerned about

---

[9] Murray v. Giarratano, 492 U.S. 1, 9 (1989) (citing Ford v. Wainwright, 477 U.S. 399, 411 (1986)).

[10] The Supreme Court has unequivocally rejected the "suggestion that the principles [governing procedural fault] . . . apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws" and similarly discarded the idea that "there is anything fundamentally unfair about enforcing procedural default rules." *Murray*, 492 U.S. at 9.

[11] *See, e.g.*, Pastrana v. Senkowski, No. CV 97-5158, 1999 U.S. Dist. LEXIS 18513, at *27 (E.D.N.Y. Oct. 1, 1999) (denying the petition for habeas corpus relief); Dones v. Johnson, No. 96 Civ. 7291, 1998 U.S. Dist. LEXIS 22263, at *16 (S.D.N.Y. June 30, 1998) (denying the petition for habeas corpus relief because the partial closure of the trial during the testimony of an undercover police officer involved in ongoing narcotics cases in the vicinity of the trial was not a violation of the petitioner's Sixth Amendment right to a public trial).

[12] In *Pastrana*, for example, an application for habeas corpus relief was denied because petitioner could not show that the state court's rejection of his claims for closure of the trial for an undercover officer's testimony, and a promptly stricken reference by a witness to uncharged crimes, was an unreasonable application of Supreme Court precedent. *Pastrana*, 1999 U.S. Dist. LEXIS 18513, at *11; *see also Dones*, 1998 U.S. Dist. LEXIS 22263, at *17.

those particular family members.[13] The witness basically stated that he was "afraid to testify in front of the family of Defendant A, but had no problem with testifying in front of the family of Defendant B." The prosecutor retorted as follows: "Judge, there is no way we can tell apart the families." The state court judge responded by excluding everyone from the courtroom. Judge Nickerson, however, eventually granted habeas relief in that case.

From my perspective, however, as someone who is in the trenches every day, I cannot state that secrecy in ordinary criminal cases, including high profile criminal cases, always takes place. For example, some applications for search warrants are made in secret and obviously the applications or the supporting documents that are offered to establish probable cause are kept secret, even after the defendant is indicted. However, in a Rule 17(c) situation,[14] where there is a subpoena of documents or discovery including Title III tapes,[15] which are not yet in the public domain, the court does not ordinarily have secrecy concerns because in ordinary cases the press is not as interested in the status of the case.

I do not believe that the walls of the Republic are crumbling because of secrecy in ordinary criminal cases. When the Gotti, Sr. case went to trial, several issues arose concerning the selection of an anonymous jury.[16] The issues were whether certain colloquy

---

[13] United States v. Prince, No. CR 93-1073, 1994 U.S. Dist. LEXIS 2962, at *23 (E.D.N.Y. Mar. 9, 1994).

[14] FED. R. CRIM. P. 17(c). Rule 17(c) provides that:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Id.

[15] 18 U.S.C. §§ 2510-2520 (1994 & Supp. IV 1998).

[16] *See* United States v. Gotti, 784 F. Supp. 1013 (E.D.N.Y. 1992); United States v. Gotti, 753 F. Supp. 443 (E.D.N.Y. 1990). John Gotti, Sr. became boss of the Gambino Crime Family after Paul Castellano, then head of the Gambino

with prospective jurors should be kept under seal and whether sidebar conferences should be kept under seal, at least for a period of time. Judge Parker and Judge Glasser granted requests to keep that information under seal.[17] In the Gotti, Jr. case,[18] tried before Judge Parker in the Southern District of New York, similar issues arose where Judge Parker sealed the record.[19] In that decision,

---

clan, was assassinated on a Manhattan street in December 1985. In 1986, an indictment was filed charging Gotti and nine other defendants under the Racketeer Influenced Corrupt Organizations Act ("RICO") with participating and conspiring to participate in affairs of the Gambino crime family through a pattern of racketeering activity. Gotti was also accused of the 1973 barroom murder of James McBratney. Gotti, represented by attorney Bruce Cutler, was acquitted in 1987 of the charges by a not-guilty jury verdict. *See* John S. DeMott, *The "Dapper Don" Beats a Rap; Crime Boss John Gotti Is Acquitted of Racketeering Charges*, TIME, Mar. 23, 1987, at 18. Two years after his acquittal, Gotti was arrested after leaving his favorite mob hangout in Little Italy, the Ravenite Social Club. He was charged with assault and conspiracy for arranging, with a Hell's Kitchen gang, a hit on John O'Connor, an official of a carpenter's union. Gotti was acquitted of these charges in 1990. The "Teflon Don" returned to court that same year when police burst into the Ravenite Social Club and arrested him. Yet again, Gotti was accused of heading an organization involved in extortion, loan sharking, obstruction of justice, robbery, gambling and tax evasion as well as masterminding the hit on Paul Castellano in 1985. *See* Ed Magnuson, *Still the Teflon Don? John Gotti Sees "No Problem" Beating the Rap Yet Again*, TIME, Dec. 24, 1990, at 19. Gotti's right hand man, Salvatore "Sammy the Bull" Gravano, turned government witness, giving key testimony about how the assassination of Castellano was orchestrated by Gotti. In 1992, following a jury trial in the Federal District Court, Eastern District of New York, Gotti was sentenced to life in prison on murder and racketeering charges.

[17] *See, e.g.*, *Gotti*, 753 F. Supp. at 449 (granting closure in bail proceedings where the defendants are "accused of participation in organized crime, the pretrial publicity is intense, and the material to which the press seeks access is extremely prejudicial").

[18] *See* United States v. Gotti, 42 F. Supp. 2d 252 (S.D.N.Y. 1999); United States v. Gotti, 9 F. Supp. 2d 320 (S.D.N.Y. 1998).

[19] *See Gotti*, 42 F. Supp. 2d at 259 (citing indictment on charges of racketeering, conspiracy, extortion, wire fraud and extortion in telecommunications); *Gotti*, 9 F. Supp. 2d at 323 (citing indictment alleging that members of the Gambino crime family engaged in extortion, illegal gambling, loan sharking, money laundering, robbery and drug trafficking). Currently serving a life sentence at the U.S. penitentiary in Marion, Illinois, John Gotti, Jr. reiterated his guilty plea to charges of racketeering, extortion and tax evasion in a sentencing

there was virtually no opposition to the sealing of the case, except maybe that made by Greg Smith.[20] However, he lost that case again.[21]

The only other thing I wanted to mention about secrecy from the perspective of someone who has gone to court in the Eastern and Southern Districts of New York almost every day for thirty years, is the security of the participants in the case. A federal court house must provide a high level of security. District court judges, moreover, are now advised not to travel with identifying vanity plates on their motor vehicles.

We live in a free and open society, and as a result we do not have secrecy in terms similar to mafia trials in Italy where judges sometimes appear behind screens. Instead, in our society, which was founded on the idea of openness and free access to the courts, we have a level of existing security that exceeds that in most other countries. Maybe the extent to which we endeavor to provide that

---

hearing in White Plains, N.Y. on September 3, 1999. Patrick Rogers et al., *The Family Way; Ill-suited for Life as a Crime Boss, John Gotti Follows His Father into Federal Prison*, PEOPLE, Sept. 27, 1999, at 79 [hereinafter *The Family Way*]. As head of the Gambino crime family, Gotti, Jr. had been accused of running a telephone calling-card fraud and extorting construction companies. Gotti, Jr. was also accused of extorting money from Scores, a topless Manhattan night club. The scheme was said by prosecutors to have included parking attendants and dancers paying kickbacks to mob bosses. *Citing Threat, Judge Orders John Gotti Jr. Held in Jail*, N.Y. TIMES, Feb. 3, 1998, at B5. Gotti, Jr. was originally arrested on January 22, 1998 along with thirty-nine other alleged members of the Gambino crime family, and charged with a number of racketeering charges. *Id.* Under investigation by the FBI since 1994, Gotti, Jr.'s problems escalated when investigators found large amounts of cash and illegal handguns, as well as a list of Gambino members during a raid at his offices in Queens and the Bergin Hunt and Fish Club. *The Family Way*, at 79. The evidence found in the raid led to Gotti, Jr.'s original guilty plea in April 1999. *Id.*

[20] Greg B. Smith, *Junior's Brand-New Jam: Enforcer Implicates Gotti in Extort Cases*, DAILY NEWS, Apr. 3, 1998, at 7; *see also* William K. Rashbaum, *Scores Duo Gets 25 Years for Fraud*, DAILY NEWS, Nov. 16, 1998, at 6 (explaining that two defendants pleaded guilty in connection with the Gotti case in a sealed proceeding and entered the witness protection program).

[21] United States v. Gotti, Jr., No. 99-1526, 2000 U.S. App. LEXIS 2739, at *5 (2d Cir. Feb. 18, 2000) (affirming Gotti, Jr.'s conviction on two counts of extortionate extension of credit).

security is absolutely necessary. Whenever one enters a courthouse these days, however, there are no friendly meetings. I am not suggesting that there should not be security. To be clear, I am suggesting that maybe more emphasis should be given to the actual security system now being implemented. In terms of closure of criminal proceedings, it is very difficult conceptually to understand in a free and open society that this level of security is necessary. Again, while this level of security may be necessary, it should be implemented in a manner so as not to alienate all those who want to visit our courthouses, whether because they want to watch the proceedings in an open courtroom, or because they are parties to litigation, or attorneys representing parties. I think we need to look into what we can do about the public perception as to open access to the courts. This will, ultimately, inure to the benefit of us all.