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MEDIA RIGHTS OF ACCESS TO PROCEEDINGS, INFORMATION, AND PARTICIPANTS IN MILITARY CRIMINAL CASES

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I. Introduction

In the good old days, a skilled trial advocate could fully and effectively represent the United States in matters of military justice. As the armed services approach criminal trial practice in the twenty-first century, training in legal skills alone will not prepare counsel to deal with media coverage and public inquiries[2] that increasingly turn routine criminal trials into high profile[3] cases.

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2. This article uses the term media interest to include the public interest. The Supreme Court has recognized that most people receive information concerning trials from the media. *See* Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555, 572-73 (1980).

3. The term "high-profile" case in this article means any criminal investigation or case that generates significant national media and public interest.

A. Media Interest in Military Criminal Cases

Recently, there has been an explosion in public access to information of all kinds. The growth of the Internet and other technologies has made it easier to access information and disseminate it to a national audience. This information explosion is coupled with an increased interest by the media in criminal trials.[4] Military criminal trials are no exception.

Military cases are attracting local and national media interest.[5] As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public.[6]

Public interest in military justice not only involves individual cases being investigated or prosecuted, but also, the rules and policies unique to military life. For example, there is intense public interest in the armed forces' treatment of sexual-liaison offenses involving homosexuality, fraternization, sexual harassment, and adultery.[7] The names of Air Force General Joseph Ralston,[8] former First Lieutenant (1LT) Kelly Flinn,[9] former

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4. The most obvious example is *The People of the State of California v. Orenthal James Simpson*. Other recent examples include the trials of Timothy McVeigh, Michael Espy, Mike Tyson, Julie Hiatt Steele, and Susan McDougal. *See generally* Joan Biskupic, *Supreme Court Rebuffs McVeigh's Appeal, Convicted Oklahoma City Bomber Claimed Trial was Tainted by Publicity, Juror Prejudice*, WASH. POST, Mar. 9, 1999, at A2.

5. *See* William Matthews, *Military Court Cases Suffer in the Hands of the Media*, ARMY TIMES, June 7, 1999, at 18; John Gibeaut, *In the Limelight's Glare, Military Lawyers Plan Counterattack in Response to Increased Media Coverage*, A.B.A. J., Oct. 1998, at 97.

6. *See supra* note 2 (providing that, for purposes of this article, media interest includes the public interest).

7. Recent examples of cases involving fraternization or adultery that were closely followed by the media are Major General (MG) Joseph Rallston (Air Force), former First Lieutenant (1LT) Kelly Flinn (Air Force), the Aberdeen Proving Ground cadre/trainee sexual misconduct cases (Army), Sergeant Major (SGM) of the Army (Ret.) Eugene McKinney (Army), Major General (MG) (Ret.) David Hale (Army) and Tailhook (Navy). The intense public debate over the military fraternization and adultery policies resulted in a review of the different services' fraternization and adultery policies and the 1998 adoption of a unified policy for all of the services. *See generally* Major Michael Hargis, *The Password is 'Common Sense': The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Mar. 1999, at 12; Lisa Daniel, *Policy Softened Against Adultery,* ARMY TIMES, Aug. 3, 1998, at 3.

8. *See* Hargis, *supra* note 7; *see also* Daniel, *supra* note 7, at 3.

9. *See* Bradley Graham & Tamara Jones, *Air Force Averts Trial of Female B-52 Pilot, General Not Honorable Discharge Granted*, WASH. POST, May 21, 1997, at A1.

Sergeant Major of the Army (SMA)(Ret.), Gene McKinney,[10] and Major General (MG)(Ret.) David Hale[11] are widely known throughout the United States.

Military cases not involving sexual misconduct are also shining in the spotlight of the national media. Recent examples include: the courts-martial of two Marine aviators, Captain (CPT) Richard Ashby and CPT Joseph Schweitzer;[12] the trials of the Army aviation crew, Chief Warrant Officer 2 (CW2) Daniel Riddell, and CW3 David Guido, following a helicopter crash that resulted in the death of Riddell's and Guido's wives;[13] and the gang murder and robbery trial of Specialist (SPC) Jacqueline Billings, the alleged "Governor" of the Fort Hood area Gangster Disciples gang.[14]

B. Issues Created by Media Presence in Criminal Cases

Media inquiries in criminal investigations and prosecutions take many forms. The media may request information from criminal investigators, prosecutors, public affairs spokes-people, local service officials, or national representatives of an armed service or the Department of Defense,

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10. *See* ABC, Inc. v. Powell, 47 M.J. 363 (1997); *see also* G.E. Willis, *McKinney Request to Rehear Case Denied–On Appeal*, ARMY TIMES, Oct. 5, 1998, at 18; Jane McHugh, *Attorney Seeks Hearing to Exonerate McKinney*, ARMY TIMES, Aug. 31, 1998, at 16; Jane McHugh, *McKinney Accuses Prosecutors of Misconduct*, ARMY TIMES, Aug. 17, 1998, at 11.

11. *See* Rene Sanchez, *Retired General to Plead Guilty*, WASH. POST, Mar. 17, 1999, at 1; G.E. Willis, *Schwartz to Consider Hale Allegations, Retired Major General Could Face Dismissal, Forfeiture of Pay, Prison*, ARMY TIMES, Oct. 5, 1998, at 18; Jane McHugh, *The Case Against Gen. Hale*, ARMY TIMES, July 20, 1998.

12. Ashby and Schweitzer originally faced courts-martial for a number of charges, including involuntary manslaughter for causing 20 deaths when their aircraft cut a ski-lift cable in Aviano, Italy. Ashby was acquitted of all charges except obstruction of justice. Schweitzer pled guilty to obstruction of justice. After Ashby's acquittal, the more serious charges against Schweitzer, the navigator, were dismissed prior to trial. *Marine Pilot in Alps Case gets 6 Months for Obstruction*, WASH. POST, May 11, 1999, at A12; Steve Vogel, *Marine Pilot Acquitted in Alps Deaths*, WASH. POST, Mar. 5, 1999, at A1; *see Pilot Tells '60 Minutes' Ski Lift Wasn't on Map*, WASH. POST, Jan. 24, 1999; *Two Marines Accused of Withholding Videotape*, WASH. POST, Sept. 2, 1998, at A19; *Airmen Face New Charges in Skiers' Deaths*, WASH. POST, Aug. 30, 1998, at A6.

13. *See* Jane McHugh, *Joyride from Hell, 2 Pilots Tried to Repay a 'Debt of the Heart', their Gift Proved Deadly*, ARMY TIMES, July 26, 1999; "*Show Off" Pilot Blamed for Helicopter Crash*, ARMY TIMES, Dec. 28, 1998, at 9.

14. *See* Elke Hutto, *Gangster Soldiers, Street Violence Hits the Military*, ARMY TIMES, Feb. 22, 1999, at 14.

about an investigation or people involved in an investigation.[15] The media may petition the court or an Article 32 officer to access, inspect, or copy evidence or judicial records. The media may request to interview military attorneys, public affairs officers, or commanders for information about how the military justice system operates, for opinions about the merits of the government's case, or for the service department or Department of Defense policy position on a volatile issue involved in a case. The media may print inaccurate information about the military criminal justice system causing negative publicity that creates a desire by the military service to reply to the misinformation.

How does a military lawyer[16] answer a request from a newspaper wanting information on how an Article 32 operates? Does the media have a right to a copy of the Article 32 investigation and exhibits before trial? If not, does the government have discretion to release them? May a government official answer whether it is true that an accused senior officer failed a polygraph and confessed? If a newspaper prints misinformation about the military justice process, may the government supply the media with correct information? Should they? Does the answer change if the misinformation involves evidence not yet introduced at trial? May the press print any information it acquires about a criminal case, regardless of how it was acquired? Does the media have an absolute right to attend all pretrial and trial proceedings? If not, what are the limits? Whose interests are balanced? What, if any control does a prosecutor or judge have on the release of information in a criminal case; or on a defense counsel trying his case in the media?[17]

These are some of the complex media-relations issues that normally arise in high-profile cases and are increasingly arising in routine cases.

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15. The Freedom of Information Act, 5 U.S.C.S. § 552 (LEXIS 2000) (FOIA), and the Privacy Act, 5 U.S.C.S. § 552a (LEXIS 2000) (PA) together govern release of information from federal government agencies. The Department of Defense and each of the services have regulations implementing FOIA and the PA. This article discusses releases of information to the media under FOIA and PA, *infra* Section IV.E.4.

16. Although media inquiries are typically the responsibility of public affairs officers, in military justice and other litigation the legal office should be the source of information regarding legal issues.

17. *See generally Latest Battles Over Lawyers' Right to Speak Out*, CHAMPION, July 1998, at 42. Captain Ashby, the accused pilot in the Aviano, Italy ski-gondola crash, appeared on CBS' *60 Minutes* to discuss the evidence his defense would present at his pending court-martial trial. Colonel (COL) James Schwenk, legal advisor to the Marine Corps Article 32 officer, was also interviewed on the show. *Pilot Tells '60 Minutes' Ski Lift Wasn't on Map*, WASH. POST, Jan. 24, 1999.

Among the goals of the government in military criminal cases are to secure justice, protect legitimate safety, personal privacy, national security, and fair trial interests, and to ensure that the public is accurately informed about, and confident in, the fair functioning of the military justice system. To intelligently promote these interests, lawyers representing the military services must understand the scope of the media right to free expression, the scope of the media's constitutional and common law rights of access to information in criminal cases, the ethical rules governing extra-judicial statements in pending criminal cases, the rules governing release of information under the Freedom of Information Act (FOIA)[18] and the Privacy Act (PA);[19] and the measures available to control publicity when a constitutionally appropriate showing has been made that such measures are necessary.

C. The Military's Changing Philosophy About Media Relations

All of the services have recognized that the days of the "no comment" response are gone.[20] Defense counsel, witnesses, other case participants, and interest groups actively solicit the media to tell their story–often to the detriment of the military.[21] The military services now recognizes that an opportunity to educate the American public about the military justice system arises with each high profile case. The services also realize that the goals of accurately informing the public about the military justice system and inspiring public confidence that the system is fair cannot be accomplished without engaging the media.[22] Both the Air Force and the Army have developed manuals to guide lawyers and other military officials in media relations in high profile cases.[23] These manuals provide media fact sheets on routine procedures in the military justice system. They also provide guidance on releasing information and how to interact effectively

18. 5 U.S.C.S. § 552 (LEXIS 2000).

19. *Id.* § 552a.

20. Matthews, *supra* note 5 (discussing negative publicity to the armed services as a result of recent high profile cases and the services' efforts to train lawyers to deal more skillfully with the media).

21. *See supra* note 17. *See also* Robert S. Bennett, *Press Advocacy and the High-Profile Client*, CHAMPION, May 1999, at 24 (discussing how defense counsel must engage in aggressive press advocacy in high profile cases to be effective).

22. Matthews, *supra* note 5.

23. *See* MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE (Feb. 1998) [hereinafter Air Force Media Guide] (Air Force publication); MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE (Nov. 1998) (Army publication).

with the media. Prior to the publication of these manuals, no service had a singular source to assist attorneys and other military officials involved in criminal trials with media relations issues.[24] In addition to the media guides, the services have begun to formally train lawyers in media relations in criminal cases. The First Joint Services High Profile Case Management Course was held from 10-12 May 1999 at the Army Judge Advocate General's School in Charlottesville, Virginia.[25] This course, geared to senior military attorneys, focused exclusively on media relations issues in high profile cases.

D. Purpose

This article examines the media's rights of free expression and access, and how these rights apply in courts-martial. Free expression is the right of the media under the First Amendment to freely publish information it gathers. Access is the media's right to attend and observe criminal proceedings, to obtain information and evidence in criminal proceedings, and to gather information from trial participants. The scope of the media's

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24. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806 (1998) [hereinafter MCM] (Public Trial); *id.* R.C.M. 405(h)(3) (discussing access by spectators to Article 32 investigations); *id.* R.C.M. 701(g)(2) (authorizing protective and modifying orders for discovery); *id.* MIL. R. EVID. 412(c)(2) (requiring a closed hearing in all nonconsensual sexual offense cases when considering the relevance of proffered evidence of the alleged victim's behavior or sexual predisposition). Among the regulatory sources for the Department of the Army are the following: U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION PROGRAM (14 May 1997) [hereinafter AR 25-55]; U.S. DEP'T OF ARMY, REG. 195-6, DEPARTMENT OF THE ARMY POLYGRAPH ACTIVITIES, para. 2-9 (29 Sept. 1995); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, para. 7-9b (19 Sept. 1994); U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, para. 1-11, ch. 3 (15 Mar. 1994); U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, paras. 3-6, 3-8 (1 May 1992) [hereinafter AR 27-26]; U.S. DEP'T OF ARMY, REG. 360-5, PUBLIC INFORMATION (31 May 1989); U.S. DEP'T OF ARMY, REG., 190-45, MILITARY POLICE LAW ENFORCEMENT REPORTING, ch. 3 (30 Sept. 1988); U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, para. 1-5(k) and ch. 4 (30 Oct. 1985); U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 July 1985); Policy Letter 98-6, Office of the Judge Advocate General (OTJAG), U.S. Army, subject: Relations with News Media (12 Sept. 1997).

25. The High Profile Course included instruction in information disclosure, ethical rules regarding extrajudicial statements, unlawful command influence, and press release writing as well as perspectives on high profile cases from prosecutors, agency counsel, judges, a public affairs officer, a press representative, and a defense counsel.

right of access is governed by the First Amendment and by the common law.

The purpose of this article is to enable lawyers to understand and apply First Amendment[26] analysis when the media's right of access to information conflicts with one or more interests advanced by a "player" in a criminal case. Players are people or entities involved in criminal cases, such as the accused, defense counsel, panel,[27] victims, third parties having an interest in the case,[28] and the government. Player interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury;[29] (2) protecting testifying witnesses from trauma, embarrassment, or humiliation;[30] (3) protecting trial participant privacy;[31] (4) protecting trial participant safety;[32] (5) preventing disclosure of government information that threatens national security, or is protected by government privilege;[33] (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants;[34] (7) protecting trade secrets or other confidential commercial information;[35] and (8) concealing the identity of juveniles.[36]

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26. U.S. CONST. amend. I.

27. A military panel is similar to a civilian jury except, among other things, that military criminal trials do not require a unanimous verdict from the panel.

28. An example of such a third party who is not an actual party or witness in a criminal case is a man, commonly known as a "john," who is listed in government investigative records as a client of a prostitute who is being prosecuted. Such a third party may allege a privacy interest to prevent the release of his name as a client to the public.

29. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 384 U.S. 333 (1966).

30. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

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

32. *See* Unabom Trial Media Coalition v. District Court, 183 F.3d 949 (9th Cir. 1999).

33. *See* United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

34. *See* Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997).

35. *See* United States v. Andreas, 150 F.3d 766 (7th Cir. 1998).

36. *See* United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995). *See generally* Dan Paul & Richard J. Ovelmen, *Access*, 540 PLI/PAT 157 (1998).

Section II explores the media's First Amendment right to freedom of expression. Section III examines the media's First Amendment right of access to criminal proceedings. Section IV discusses the media's First Amendment and common law rights of access to information in criminal cases, particularly to judicial records, evidence, and discovery. This section also examines how the statutory and regulatory rules of FOIA and the PA can satisfy the media's common law right of access to judicial records in military cases but may impinge on the media's First Amendment right of access to the same records. Section V examines media rights of access to information from trial participants. The section looks at ethics rules limiting extra-judicial statements to the media by attorneys involved in pending cases. This section also discusses constitutional problems with the ethics rules currently in force in each of the armed services. Finally, the section explores the power of courts to issue "gag orders"[37] limiting counsel and other players from disseminating information about a case or from making extra-judicial statements about a pending case. Ethics rules and gag orders also involve First Amendment analysis.

The body of the article recommends three changes to the *Manual for Courts-Martial* and to military service regulations to improve the armed services' management of high profile cases. These recommendations include: (1) amending Rule for Courts-Martial (R.C.M.) 806[38] in four respects: first, to eliminate the current language empowering a military judge to close a courts-martial session for good cause and substitute the four-part test required by the Supreme Court and the United States Court of Appeals for the Armed Forces (CAAF)[39] for closure;[40] second, to remove the limitation on the military judge's power to close part or all of courts-martial trials over the objection of the accused when the govern-

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37. A "gag order" is an order by the court, to proscribe extrajudicial statements by any lawyer, party, witness, or court official. Normally, the intent of a gag order is to stop the flow of information from court participants which divulges prejudicial matters, such as the refusal of the defendant to submit to interrogation or take lie detector tests, any statement made by the defendant to officials, the identity of prospective witnesses or their probable testimony, any belief in guilt or innocence, or like statements concerning the merits of the case. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). *See generally* Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial, What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus,"* 26 SUFFOLK U.L. REV. 1063, 1084 (1992).

38. MCM, *supra* note 24, R.C.M. 806.

39. On 5 October 1994, Congress changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The names of the four intermediate service courts (Army, Air Force, Navy-Marine, and Coast Guard Courts of Military Review, abbreviated, respectively, as

ment has demonstrated that closure is necessary and narrowly tailored to protect a compelling interest after considering all reasonable alternatives to closure;[41] third, to codify that, from referral to authentication, the military judge is responsible for all judicial records filed in connection with a court-martial and is also responsible for determining whether and when such court documents should be released to the media or to the public; and fourth, to provide that the media and the public be given notice and an opportunity to be heard before courts-martial sessions are closed or judicial records are sealed; (2) amending R.C.M. 405(h)(3)[42] to require that Article 32 hearings be open unless, prior to closing an Article 32, the media and the public are given notice and an opportunity to be heard and closure is based on the four-part test mandated by the Supreme Court and CAAF;[43] and (3) updating service ethics rules on trial publicity to delete language that is unconstitutionally vague.[44]

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39. (continued) A.C.M.R., A.F.C.M.R., N.M.C.M.R., and C.G.C.M.R.) were also changed. The current names of the four intermediate service courts are the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (codified at 10 U.S.C.S. § 941 (LEXIS 2000)).

40. As discussed *infra*, Section III, both the Supreme Court and the CAAF require four conditions to be satisfied prior to closing a criminal trial: (1) the party seeking closure must advance a compelling interest articulated by individualized, case-by-case, findings that is likely to be prejudiced; (2) closure is narrowly tailored to protect the compelling interest; (3) the trial court considered and rejected reasonable alternatives to closure; and (4) the trial court made adequate, on the record, findings supporting the closure to aid in appellate review. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); ABC, Inc. v. Powell, 47 M.J. 363 (1997); United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998).

41. MCM, *supra* note 24, R.C.M. 806(b) (currently authorizing the military judge to close a court-martial session over the objection of the accused only when expressly authorized by the MCM).

42. *Id.* R.C.M. 405(h)(3) (currently allowing Article 32 investigations to be closed in the discretion of the commander who directed the investigation or the investigating officer).

43. *See supra* note 40.

44. As discussed *infra*, Section V, each of the military service ethics rules currently contains language that the Supreme Court found unconstitutionally vague in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

II. Free Expression

A. Supreme Court

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."[45] The founding fathers recognized that a free uncensored press is essential to a democracy to inform the public about government operations and subject them to public scrutiny.[46] Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors.[47] In criminal justice matters, freedom of the press allows the public to understand the criminal justice system and to be confident that the system fairly secures justice.[48]

Attempts by the government, through statute or otherwise, to enjoin the media from publishing information are called "prior restraints."[49] Courts view prior restraints with a heavy presumption against their constitutional validity.[50] The heavy burden on the government to justify a prior restraint cannot be based on mere speculation of harm.[51]

The burden on the government is so high that it rarely tries to actually enjoin the press from publication.[52] Early landmark cases involving prior

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45. U.S. CONST. amend. I.

46. New York Times Co. v. United States, 403 U.S. 713, 715-17 (1971) (Black J., concurring).

47. *Id.* at 724 (Douglas J. concurring) (citing New York Times v. Sullivan, 376 U.S. 254, 269-70 (1963)).

48. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J. concurring jointed by Stewart J. and Marshall J). These concurring Justices said that

> commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Id.

49. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Jeffries v. Mississippi, 724 So. 2d 897 (Miss. 1998).

50. *New York Times Co.*, 403 U.S. at 714 (per curiam).

51. *Id.* at 725 (Brennan J., concurring).

52. The prior restraint doctrine doesn't apply to speech or press involving obscenity

restraints were *Near v. Minnesota*[53] and *New York Times Co. v. United States.*[54] In *New York Times*, the government tried to enjoin the *New York Times* from publishing the contents of a classified study[55] about American involvement in the Vietnam war that was secretly taken from the Department of Defense and given to the *New York Times* by a former defense department employee. The government argued that release of the classified study would endanger national security and that there were statutes that arguably made publication of the study a criminal act.[56] Six justices in a per curiam opinion held that the government did not meet its burden.

In 1976 and 1977, the Supreme Court considered for the first time, two cases in which state criminal courts enjoined the media from publishing information.[57] In *Nebraska Press Ass'n v. Stuart*, the justification for the injunction was that publication threatened the accused's Sixth Amendment right to a fair trial.[58] In *Oklahoma Publishing Co. v. District Court of Oklahoma County*, the justification for the injunction was the state's interest in preventing public access to records of juvenile proceedings.[59]

Nebraska Press involved a highly publicized multiple murder where the prosecutor and the defense jointly requested a court order stating what information the media (or anyone else) may disclose or publish to the public. Both sides were concerned that the massive press coverage created a reasonable likelihood that prejudicial news would make it difficult, if not impossible, to impanel an impartial jury and secure a fair trial. Nebraska law required that the accused be tried within six months of his arrest, and that a change of venue could move the case only to adjoining counties that, the parties argued, received the same publicity.[60] In an open hearing, the

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52. (continued) and other sppech not protected by the First Amendment. *See* Freedman v. Maryland, 380 U.S. 51 (1965).

53. 283 U.S. 697 (1931) (holding that state statute restraining publication of malicious, scandalous, and defamatory articles against political and public figures violates the First Amendment).

54. 403 U.S. 713 (1971).

55. This classified study was entitled, "History of U.S. Decision-Making Process on Viet Nam Policy" and became commonly referred to as the "Pentagon Papers." *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW, ch. 17, at 811 (2d ed. 1997).

56. *Id.* at 733-41 (discussing the germane criminal statutes to include the Espionage Act).

57. Oklahoma Publ'g Co. v. District Court of Oklahoma, 430 U.S. 308 (1977) (per curiam); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

58. *Nebraska Press Ass'n*, 427 U.S. at 542.

59. *Oklahoma Publ'g*, 430 U.S. at 1045.

60. *Nebraska Press Ass'n*, 427 U.S. at 545.

county court heard oral argument on the motion but took no evidence. No attorney for the press appeared. The original county court order prohibited everyone in attendance at the hearing from disseminating any testimony given or evidence adduced from the hearing (as well as from the open preliminary hearing held the following day) and for the press to observe the Nebraska Bar-Press Guidelines.[61] The Nebraska Supreme Court modified the order. The new order restrained the press from reporting: (1) the existence and nature of any confessions or admissions made to law enforcement officers, (2) any confessions or admissions made to any third parties except members of the press, and (3) other facts "strongly implicative" of the accused.[62] The order expired when the jury was impaneled.[63] The Supreme Court granted certiorari and reversed.

The majority first held that any attempt by the government to prohibit reporting of evidence adduced at an open proceeding is unconstitutional.[64] The majority agreed with the finding by the trial judge that there was extensive pretrial publicity that (based on common sense) may impair the accused's right to a fair trial but rejected as speculative the trial judge's conclusion that there was a clear and present danger that the pretrial publicity could impinge on the accused's right to a fair trial in this case.[65] The Court went on to hold that the state did not meet its heavy burden to justify the injunction because: (1) the record did not provide evidence that measures short of a prior restraint on the news media would not have sufficiently mitigated the adverse effects of trial publicity,[66] (2) the part of the order prohibiting the press from reporting on facts "strongly implicative" of the accused was vague and overbroad, and (3) the fact that the order was temporary did not change its character as a prior restraint.[67]

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61. *Id.* at 542, 543. The Nebraska Bar-Press Guidelines are voluntary standards adopted by members of the state bar and news media regarding what information is appropriate for print in pending criminal cases. Both the American Bar Association Model Rules and the Army have ethical standards governing extra-judicial statements in criminal cases. These ethical rules will be discussed *infra* in Section V.

62. *Id.* at 545.

63. *Id.*

64. *Id.* at 568. *See also* Jeffries v. Mississippi, 724 So. 2d 897 (Miss. 1998).

65. *Nebraska Press Ass'n*, 427 U.S. at 568-69.

66. *Id.* at 539, 543. The state court implied that alternatives to prior restraint would be ineffective. Although the county court did not hold an evidentiary hearing, the District Court conducted a hearing where county court judge testified and newspaper articles about the case were admitted into evidence. *Id.*

67. *Id.* at 568-69.

The majority noted that widespread, even adverse pretrial publicity does not necessarily lead to an unfair trial.[68] Cases where such publicity is prejudicial are rare.[69] The Court stated that, in the few cases where it had reversed convictions tainted by prejudicial pretrial publicity, the taint could have been cured by some measure short of a prior restraint on the press.[70] Such measures include a change of venue, postponement of trial until prejudicial publicity abates, voir dire, jury instructions to decide issues only on evidence presented at trial, jury sequestration, and trial court "gag orders" limiting extra-judicial statements by participating counsel, police, and witnesses.[71] Notwithstanding this dicta, the majority did not rule out the possibility of an extreme case where there would be such a

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68. *Id.* at 554.

69. *Id*.

70. *Id.* at 569 (referring to Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Estes v. Texas, 381 U.S. 532, 550-551 (1965); Rideau v. Louisiana, 373 U.S. 723, 726 (1963); Irvin v. Dowd, 366 U.S. 717, 728 (1961)).

71. *Id.* at 563-64. Thirteen years later, in 1991, the Supreme Court limited the requirement for searching voir dire to gauge the impact of pretrial publicity. In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Supreme Court affirmed a death penalty conviction in a state case of a convict serving a sentence for murder who killed again while on work release. There was massive pretrial publicity against the accused that included information about his past criminal record, that he was rejected for parole six times, accounts of his prison misconduct, details about his first murder, comments that the death penalty was not available when Mu' Min was convicted for his first murder, and indications that Mu' Min confessed to the current murder. The defense submitted 64 voir dire questions for the court to ask regarding the content of pretrial publicity, asked for individual voir dire, and a change of venue. The trial court rejected the entire defense request and, instead, asked in group voir dire, whether jurors had prior information about the case. The jurors answering "yes" were divided into groups of four and asked by the trial court whether they had formed an opinion about the case and whether they could be impartial notwithstanding the information they already knew about the case. No questions were asked about the content of the news that the jurors saw. The Supreme Court stated that trial courts have wide discretion in voir dire and held that an accused's constitutional right to an impartial jury means that an accused has a right to know whether a juror can remain impartial in spite of his exposure to pretrial publicity. An accused has no constitutional right to explore the content of publicity jurors have been exposed to. For an additional discussion of alternatives to prior restraint in high profile cases, see Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'-Min Remedy*, 69 S. CAL. L. REV. 1587 (1996); William G. Kastin, *Presumed Guilt: Trial by the Media the Supreme Court's Refusal to Protect Criminal defendants in High Publicity Cases*, 10 N.Y.L. SCH. J. HUM. RTS. 107 (1992). A few post-*Mu'Min* cases were reversed for prejudicial pretrial publicity impacting on the accused's right to a fair trial by an impartial jury. *See, e.g.*, United States v. Beckner, 69 F.3d 1290 (5th Cir. 1995) (recognizing that Federal Circuits such as the Fifth Circuit may require content based voir dire in their jurisdictions); Tuggle v. Thompson, 854 F. Supp. 1229 (W.D. Va. 1994) (granting habeas petition in part because of voir dire restrictions on the defense).

threat to fair trial rights that would possess the requisite degree of certainty to justify a prior restraint.[72] Three Justices, with a fourth leaning this way, flatly rejected prior restraints on the press as a permissible means of enforcing an accused's Sixth Amendment right to a fair trial.[73]

Nebraska Press also recognized that a state might not be able to enforce a restraining order against a media source outside its territorial jurisdiction.[74] Military courts would face similar jurisdictional issues enforcing an order against the media. The *Manual for Courts-Martial* provides no authority for the military judge to punish a media violation of an order by a military judge.[75]

The Supreme Court has consistently struck down government attempts to limit media publication of events or information when the media has legitimately obtained the information by attending a proceeding or when the government has released the information. In *Oklahoma Publishing Co. v. District Court of Oklahoma County,*[76] the Supreme Court struck down a state court order enjoining the media from publishing the name or photograph of a juvenile court proceeding attended by the media. State law mandated closed juvenile proceedings unless a judge specifically ordered an open hearing.[77] In this case, the media was allowed to attend the juvenile hearing but the judge never specifically ordered that the hearing be open. The Supreme Court held that once the media is allowed to observe the proceedings, it can "print with impunity" what it observes tran-

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72. *Nebraska Press Ass'n*, 427 U.S. at 569.

73. *Id.* at 572 (Brennan J. concurring with Stewart J., and Marshall J. joining). Justice Stevens agreed with the principle that courts cannot enjoin the press to protect an accused's right to a fair trial but he did not discount the possibility that there may be a sufficiently extreme case where a prior restraint may be imposed). *Id.* at 617 (Stevens, J. concurring).

74. *Id.* at 565 (holding that the state court lacks in personem jurisdiction over the media entity). *But see* State-Record v. South Carolina, 504 S.E.2d 592 (S.C. 1998) (citing Degen v. United States, 517 U.S. 820 (1996) for the proposition that courts have inherent authority to protect their proceedings).

75. *See* MCM, *supra* note 24, art. 48, R.C.M. 801(b)(2), R.C.M. 809. Article 48 authorizes courts-martial to punish for contempt any person using a menacing word, sign, or gesture in its presence or who disturbs its proceedings by riot or disorder. R.C.M. 801(b)(2) authorizes the military judge to exercise contempt power subject to R.C.M. 809. R.C.M. 809 implements Article 48. The discussion to R.C.M. 809 states that the military judge issue orders to ensure orderly progress of trial but may not punish violations of such orders by contempt.

76. 430 U.S. 308 (1977).

77. *Id.* at 309.

spiring in the courtroom.[78] The Supreme Court has also struck down state attempts to impose civil and criminal sanctions, not amounting to injunctions, against the media to deter the media from publishing information, such as the name of rape victims, that the state does not want publicized when the information being published was released by the government or made available in an open criminal proceeding.[79]

The Supreme Court has carved out one limited exception to *Nebraska Press* and *Oklahoma Publishing*.[80] *Seattle Times Co. v. Rhinehart* upheld a trial court order restraining a media entity that was a party to the litigation[81] from disclosing information obtained through discovery in a civil case.[82] The order in this case did not prevent the Seattle Times Company from publishing or distributing any information obtained through discovery, if it also obtained the same information from an outside source.[83] The deciding factor in this case was that the newspapers were parties to the lawsuit and would not have obtained the information but for its discovery rights as a party. The Court opined that a party's right of access to discovery is a matter of legislative grace.[84] Access to discovery is solely for purposes of trying the suit. Restraints on discovered information are not a restriction on a traditionally public source of information.[85]

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78. *Id.* at 311 (citing Craig v. Harney, 331 U.S. 367 (1947) ("Those who see and hear what transpired [in the courtroom] can report it with impunity.")).

79. *See* Florida Star v. BJF, 491 U.S. 524 (1989) (rape victim's name lawfully obtained from police records); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (juvenile offender's name without written approval of juvenile court where paper learned of name from witnesses, the police, and a local prosecutor); Cox Broad. Co. v. Cohn, 420 U.S. 469 (1975) (rape victim's name revealed during trial).

80. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

81. The media defendants were the *Seattle Times Co.* and the *Walla Walla Union Bulletin. See id.* at 23.

82. *Id.* The media entities were defendants in a civil defamation suit brought by a religious organization. Over plaintiff's objection the media entities obtained, through discovery, a list of donors who made contributions to the religious organization and other membership information. The court issued the protective order for good cause, pursuant to Federal Rule of Civil Procedure 26(c), finding that that public release of the information would adversely affect reputation and privacy of the donors and members.

83. *Seattle Times Co.*, 467 U.S. at 34.

84. *Id.* at 21.

85. *Id.*

The question left unresolved by *Seattle Times* is whether a court can enjoin the media from printing discovery information it obtains from a court participant who violates a protective order. Under the rationale of *New York Times*, such an injunction should violate the First Amendment.[86] Two recent cases have upheld injunctions restraining the media from publishing information gathered in violation of the attorney/client privilege. In *United States v. Noriega*, the Eleventh Circuit upheld a temporary restraining order (TRO) preventing Cable News Network (CNN) from publishing recordings of telephone calls made from prison between Noriega and his attorney.[87] In *State-Record v. South Carolina*, the Supreme Court of North Carolina upheld a TRO prohibiting the media from publishing a videotape containing privileged communication between an accused and his attorney.[88]

Nebraska Press/*Oklahoma Publishing* is the law of prior restraints in criminal cases today. The practical lesson from these cases is that enjoining the press from reporting information it lawfully obtains is, normally, not an option in criminal cases.[89]

B. Military Courts

The parties to courts-martial are the United States and the accused; thus, the facts of *Seattle Times* will not occur in military trials. To date, no military court, in any published case, has attempted to enjoin the media from publishing information.

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86. New York Times Co. v. Sullivan, 403 U.S. 713 (1971) (striking down prior restraint where media published classified study that was taken from the Department of Defense without authorization and given to the media).

87. 917 F.2d 1543 (11th Cir. 1990). The trial court granted the TRO because CNN did not produce the tape of the recorded conversations for the district court to review. The district court, in a later decision, refused to permanently enjoin CNN from publishing the tapes, finding that neither the threat of pretrial prejudice nor the impact on effective assistance of counselwas sufficiently jeopardized to justify a prior restraint. *See* United States v. Noriega, 752 F. Supp. 1045 (1990). The Supreme Court denied certiorari in *Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990) (Marshall, J. dissenting). Justices Marshall and O'Connor would have granted certiorari to make clear that courts do not have authority to temporarily restrain media publication pending application of the *Nebraska Press* test.

88. 504 S.E.2d 592 (S.C. 1998).

89. It is unclear whether the media may be restrained from publishing information it obtains unlawfully. *See New York Times*, 403 U.S. at 17. *But see Noriega*, 917 F.2d at 1543; *State-Record*, 504 S.E.2d at 592. Injunction may not be an option even if the information is unlawfully obtained by the media.

Few military cases have addressed the impact of pretrial publicity on an accused's right to a fair trial by an impartial jury.[90] To date no military case has been reversed for this reason.

III. Access To Criminal Proceedings and Pretrial Investigations

A. Distinctions Between Right of Free Expression and Right of Access

Freedom of expression under the First Amendment allows the media to express or publish information it acquires without government restraint or interference.[91] The media also has a qualified First Amendment right of access to criminal trials and certain pretrial proceedings.[92] Finally, the media has a common law right to inspect and copy judicial records.[93] A trial attorney cannot form an effective media relations strategy without understanding the scope of and distinctions between media rights of free

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90. A detailed analysis of the impact of prejudicial pretrial publicity on the accused's right to a fair trial by an impartial jury is beyond the scope of this article. Several recent military cases have addressed this issue. *See* United States v. Rockwood, 52 M.J. 98 (1999) (rejecting accused's allegation of pretrial publicity finding that accused generated most of the publicity and argued against a government motion to instruct members to avoid pretrial publicity); United States v. Curtis, 44 M.J. 106, 132-39 (1996) (defining two types of prejudice that may result from publicity–presumed prejudice where pretrial publicity is prejudicial and inflammatory and has saturated the community; and actual prejudice where the publicity results in jurors with such fixed opinions that they cannot impartially judge the guilt of the accused); United States v. Loving, 41 M.J. 213, 253 (1994) (finding that the defense was not denied media information to raise prejudicial trial publicity challenge); United States v. Moultak, 21 U.S. 822 (N.M.C.M.R. 1985) (opining that official involvement by giving post-trial interviews with press does not automatically disqualify convening authority or SJA from post-trial review); United States v. Garwood, 20 M.J. 148 (C.M.A. 1985) (holding that the military judge's violation of the American Bar Association Code of Judicial Conduct by publicly discussing an on-going trial with the media did not disqualify him in trial by members where extensive voir dire of members revealed no prejudicial impact); United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981) (deciding that an SJA is not disqualified from preparing post trial review because he explained plea bargain procedures in post-trial interview with installation newspaper); United States v. Creer, No. NMCM 96 00469, 1997 CCA LEXIS 277 (N.M. Ct. Crim. App., Apr. 9, 1997) (finding no connection between extensive media coverage of rape of Okinawan school girl by three Marines and accused's trial).

91. *New York Times*, 403 U.S. at 713.

92. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

93. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

expression and media rights to access proceedings and information in criminal cases.

The media's right to free expression is virtually absolute.[94] Counsel and courts can almost never prevent the media from publishing information produced at a public proceeding or information the media obtains from third party sources not affiliated with a judicial proceeding.[95] The Supreme Court considers an attempt by the government to silence, delay,[96] or penalize[97] media publication of information as a prior restraint. Prior restraints are presumed unconstitutional.[98]

The media right of access to criminal proceedings is less broad than the right to free expression. The Supreme Court has held that the media has a qualified First Amendment right to attend criminal trials,[99] jury selection proceedings,[100] and pretrial probable cause hearings.[101] In these access decisions, the Supreme Court has developed a two-part test to determine whether the media has a qualified First Amendment right of access to attend other proceedings involving criminal cases. The cases refer to this analysis as the test of experience and logic.[102] First (the experience prong), the Court assesses whether the United States has experienced a history of openness or public access to the type of proceeding at issue. Second (the logic prong), the Court determines whether public access to such

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94. *See New York Times Co.*, 403 U.S. at 713.

95. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The Court recognized that there is no absolute right to free expression but it would be difficult to show the kind of threat to fair trial rights that would be so certain to justify a prior restraint on the media. *Id.* at 569-70.

96. *Id.* at 559-61 (finding a government order to the media to postpone publication to be a prior restraint); United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998) ("[O]nce access is found to be appropriate, access ought to be 'immediate and contemporaneous.'").

97. *See* Landmark Communications v. Virginia, 435 U.S. 829 (1978) (holding unconstitutional a statute criminalizing publication about proceedings of state commission investigating judicial misconduct).

98. *Nebraska Press Ass'n*, 427 U.S. at 570.

99. Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

100. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

101. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

102. *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149 (1993); *Press-Enterprise II*, 478 U.S. at 8; *Globe Newspaper Co.*, 457 U.S. at 604-07.

proceedings logically plays a particularly significant role in the functioning of the judicial process and the government as a whole.[103]

If the proceedings have traditionally been open and public access is essential to the proper functioning of the judicial system, then the media has a First Amendment right to attend the proceeding.[104] The media also has standing to challenge denial of access.[105] The party seeking to prevent the media right of access must show, in specific, on the record, findings that (1) closure is essential to preserve higher values or compelling interests; (2) individualized, case-by-case findings justify each closure; (3) closure is narrowly tailored to serve the compelling interest.[106] To conclude that closure is narrowly tailored to achieve the interest, the court must consider alternatives to closure.[107] This is typical fundamental right/strict scrutiny analysis.[108]

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103. *See* United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) (listing the following six societal interests encouraged by open hearings that must be considered in evaluating the logic prong: (1) promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; (3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion; (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny; (5) enhancement of the performance of all involved; and (6) discouragement of perjury).

104. *Compare Globe Newspaper Co.*, 457 U.S. at 596 (criminal trial traditionally open to public) *with* Pell v. Procunier, 417 U.S. 817 (1974) (prisons not traditionally open to public) *and* JB Pictures, Inc v. Department of Defense, 86 F.3d 236, 240 (D.C. Cir. 1996) (military bases not traditionally open to the public). *See also Richmond Newspapers*, 448 U.S. at 565–79 (discussing historical foundation for open public trials). *Cf.* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (declining to apply the two-part test in deciding whether the media has a First Amendment right of access to a county jail).

105. *See Globe Newspaper Co.*, 457 U.S. at 596. For a case-by-case approach to be meaningful, the media and the public must have an opportunity to be heard on the question of closure. *Id.* at 609 n.25.

106. *Press-Enterprise II*, 478 U.S. at 9; Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

107. *Press-Enterprise II*, 478 U.S. at 14; *Press-Enterprise I*, 464 U.S. at 513.

108. The Sixth Amendment guarantees every accused the right to a public trial. The same strict scrutiny test applies when a criminal proceeding is closed over the objection of an accused. If the trial court closes a criminal proceeding over the objection of the accused without applying the strict compelling interest/individualized findings/narrowly tailored means test, the penalty is automatic reversal. Denial of an accused's right to public trial, over his objection, is one of the few constitutional errors the Supreme Court calls "structural defect" calls "structural defects." Such structural defects are not subject to harmless error analysis and and, if they exist, require automatic reversal without a showing of prejudice. *See* Neder v. United States, 527 U.S. 1, 5 (1999); Waller v. Georgia, 467 U.S.

When a court finds in an individual case that there is a compelling interest[109] that conflicts with the media right of access, the court weighs the interest asserted with the need and benefits for openness to determine whether closure or a less stringent alternative is required.[110]

If the compelling interest is an accused's Sixth Amendment right to a fair trial, a proceeding cannot be closed unless the court makes a case specific finding that there is a substantial probability that the Sixth Amendment right to a fair trial will be prejudiced by publicity that closure would prevent, and that reasonable alternatives to closure cannot adequately protect that right.[111] Mandatory closure statutes to protect the right of all accused to a fair trial are unconstitutional.[112]

If the compelling interest is the privacy of a juror, the physical and psychological well being of a victim, or other need to restrict disclosure of sensitive information, then closure must be supported on the record by individualized findings that closure is necessary to protect the interest in each case.[113] Mandatory closure statutes to protect these interests in every case are unconstitutional.[114]

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108. (continued) 39 (1984). *See also* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of rape and sexual assault of minor step-granddaughter); Braun v. Powell, 77 F. Supp. 2d 973 (E.D. Wis. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of first degree murder); Carter v. Maryland, 738 A.2d 871 (Md. 1999) (reversing for denial of the accused's Sixth Amendment right to public trial a conviction of rape of 14 year-old).

109. Interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury; (2) protecting testifying witnesses from trauma, embarrassment, or humiliation; (3) protecting trial participant privacy; (4) protecting trial participant safety; (5) preventing disclosure of government information that threatens national security, or is protected by government privilege; (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants; (7) protecting trade secrets or other confidential commercial information; and (8) concealing the identity of juveniles. For examples of cases involving these interests, see *supra* notes 29-36.

110. *Press-Enterprise I*, 464 U.S. at 512.

111. *Id.* at 514; *El Vocero de Puerto Rico*, 508 U.S at 150.

112. 112. *El Vocero de Puerto Rico*, 508 U.S. at 147.

113. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-10 (1982).

114. *Id.* at 611 n.27.

Finally, when the right of access is triggered, access should occur immediately.[115] The government may not prevent the media from attending a proceeding by offering to provide a transcript of the proceeding after it occurs.[116]

B. Access to Criminal Trials

In 1980, the Supreme Court held, for the first time, that the press and the public have a First Amendment right of access to criminal trials.[117] This right of access is the right to attend a proceeding and to hear, see, and communicate observations about it.[118] In *Richmond Newspapers*, the Court held that criminal trials were historically open to the public and that the public plays a positive role in the functioning of criminal trials (the experience/logic test).[119] As the experience/logic test is met, the First Amendment right of access attaches to criminal trials.[120] Thus, a criminal trial may not be closed to the public without a compelling interest articulated in findings on the record, and a determination by the court that alternative measures short of closure were considered and deemed insufficient to protect the overriding interest.[121]

Two years later, the Supreme Court fine-tuned the test for closing proceedings to which the First Amendment right of access has attached. Any closure of part or all of a trial must also be narrowly tailored to serve that interest.[122] This test remains the law of the land. *Globe Newspaper Co. v. Superior Court* struck down a state statute mandating trial closure during

115. United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998). ("[O]nce access is found to be appropriate, access ought to be 'immediate and contemporaneous.'").

116. *Id.*

117. Richmond Newspapers, Inc. v. Commonwealth, 448 U.S. 555, 558-81 (1980).

118. *Id.* at 576.

119. *Id.* at 574-78.

120. *Id.* at 580.

121. *Id.* at 581 (suggesting alternatives to closure cited by *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-565 (1976) and *Sheppard v. Maxwell*, 364 U.S. 333, 357-362 (1966)). These alternatives include changing venue of trial to one with less publicity, postponing the trial so that public attention would decrease, intensive voir dire, and emphatic and clear jury instructions on the duty of jurors to decide a case based only on evidence presented in open court, sequestration, and court imposed "gag orders" limiting what trial participants (normally, lawyers, police and witnesses) may say. *Id.*

122. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

the testimony of a minor victim in sex offenses cases.[123] The statute did not deny the media access to transcripts of the closed portions of the trial.[124] While the Court recognized that protecting the physical and psychological well-being of a minor victim is a compelling state interest, it held that statutorily mandated closure without particularized case-by-case determinations was not narrowly tailored to serve that interest.[125] The Court emphasized that its holding was narrow in that only a mandatory closure law respecting the testimony of minor sex victims is unconstitutional.[126] The unanswered question is whether statutes mandating closure for interests other than the privacy of a minor sex victim are constitutional.[127]

Both *Richmond Newspapers* and *Globe Newspaper Co.* recognized the power of courts to impose reasonable time, place, and manner restrictions to control courtroom decorum, to withhold access to sensitive details concerning victims and the victim's future testimony, and to hold in-camera conferences.[128]

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123. *Id.*

124. *Id.* at 610.

125. *Id.* at 607-09. The court rejected as speculative and contrary to logic and common sense, the second interest advanced by the state–that mandatory closure encourages minor victims to come forward and provide accurate testimony. *Id.* at 609-10.

126. *Id.* at 609 n.22, 611 n.27. The court, in dicta, indicated that a statute giving a trial judge discretion to close a trial during the testimony of a minor victim of a sex offense is constitutional.

127. *See* United States v. Three Juveniles, 61 F.3d 86, 89 (1st Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996). The Supreme Court has never determined whether the First Amendment right of public access attaches to juvenile proceedings, nor whether across-the-board closure of such proceedings violates the First Amendment. *Id. See also* United States v. Lonetree, 31 M.J. 849, 852-55 (N.M.C.M.R. 1990), *aff'd and rem'd* 35 M.J. 396 (C.M.A. (1992). Military Rule of Evidence 505(j)(5) authorizes, but does not require, a military judge to close portions of a court-martial during testimony of a witness that discloses classified information. The court rejected the defense arguments, finding a distinction between closure based on individual privacy interests where individual findings are required to justify each closure and closure because of information detrimental to the national security where the individualized findings addresses the type information to be protected. Thus, once the military judge made findings that individualized classified information is detrimental to national security, he does not have to make individualized findings each time a witness or document refers to the information. *Id.*

128. *Globe Newspaper Co.*, 457 U.S. 607 n.17, 609 n.25; *Richmond Newspapers, Inc.*, 448 U.S. at 598 n.23. In Sixth Amendment public trial cases, federal circuit courts have distinguished between total closure (closed to the public and media) and partial closure (open to the public but closed to one or more persons). The circuits are divided over whether partial closures may be justified on a lesser standard of "substantial reason." *Compare* United States v. Osborne, 68 F.3d 94 (5th Cir. 1995) (citing decisions by the Second,

C. Access to Pretrial and Other Hearings Relating to a Criminal Trial

In 1984 and 1986, the Supreme Court, in *Press-Enterprise I*[129] and *Press-Enterprise II*,[130] extended the media's constitutional right of access to voir dire proceedings and preliminary probable cause hearings, respectively. Also in 1984, Supreme Court dicta in *Waller v. Georgia*, recognized the media's right to attend suppression hearings.[131] As with criminal trials, voir dire proceedings, preliminary probable cause hearings, and suppression hearings met the experience/logic test.[132]

Press-Enterprise I viewed voir dire as part of a criminal trial.[133] *Press-Enterprise II* found it significant that preliminary probable cause hearings often provide the sole means for the public to observe the operation of the criminal justice system in many cases.[134] No felony trial can take place unless there is a grand jury indictment or a finding of probable cause by a neutral and detached magistrate at a preliminary hearing (or both if the accused requests a preliminary hearing after the grand jury has returned an indictment).[135] Preliminary probable cause hearings are adversarial. The accused may personally appear, be represented by counsel, cross-examine witnesses, present evidence, and move to suppress illegally

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128. (continued) Eighth, Ninth, Tenth, and Eleventh Circuits to hold that partial closures do not raise the same Constitutional concerns as total closures and may be justified by a "substantial reason" for closure) *with* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (declining to adopt "substantial reason" for partial closure because the Supreme Court requires a compelling interest to justify all closures).

129. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

130. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

131. 467 U.S. 39, 44-46 (1984) (holding that the Sixth Amendment is violated when a suppression hearing is closed over the objection of the accused without meeting the compelling interest/individualized findings/narrowly tailored means test). Improper closing, in violation of the Sixth Amendment is a structural defect in the trial resulting in automatic reversal. *See supra* note 108.

132. The experience prong is met when there is a tradition of public access to the type of proceeding. The logic prong is met when the public plays a particularly significant positive role in the functioning of such proceedings.

133. Openness in criminal trials, including the selection of jurors, enhances the fairness and appearances of the criminal trial. Public jury proceedings vindicate the concerns of victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. *See Press-Enterprise I*, 464 U.S. at 501, 509.

134. *Press-Enterprise II*, 478 U.S. at 12.

135. Although *Press-Enterprise II* addressed California procedures, similar grand jury/preliminary probable cause hearing procedures are conducted in other states. *Id.* at 10-12, n.3.

obtained evidence.[136] *Press-Enterprise II* extended the First Amendment right of access to preliminary probable cause hearings because of their extensiveness and importance to the criminal justice system and the finality of the case at the preliminary hearing stage when no probable cause is found based on competent evidence.[137] *Waller* recognized similar public interests in suppression hearings, which frequently involve allegations of police and prosecutorial misconduct.[138] Thus, the strict scrutiny, First Amendment access analysis applied to closures of criminal trials applies equally to closures of voir dire proceedings, preliminary probable cause hearings, and suppression hearings.[139]

In 1993, the Supreme Court unanimously rejected an attempt by Puerto Rico to distinguish its closed preliminary probable cause hearings from the preliminary probable cause hearings (like the ones conducted in California) held to be traditionally open in *Press-Enterprise II*. In *El Vocero de Puerto Rico v. Puerto Rico*, the Puerto Rico Supreme Court upheld Puerto Rico's statute closing preliminary probable cause hearings unless the accused requests that it be open.[140] The court held that *Press-Enterprise II* was not controlling because preliminary probable cause hearings were traditionally closed in Puerto Rico's history and open hearings would prejudice an accused's right to a fair trial because Puerto Rico was small and densely populated.[141] The Supreme Court found the Puerto Rico distinctions insubstantial,[142] holding that the inquiry as to whether there is a history of openness looks to the history of the United States as a whole, not the history of a particular jurisdiction and that, although the threat of prej-

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136. *Id.* at 12.

137. *Id.*

138. Open suppression hearings are needed because the public has a strong interest in monitoring police and prosecutors and in exposing allegations of misconduct. *See* Waller v. Georgia, 467 U.S. 39, 45-46 (1984).

139. Closure must be justified by a compelling interest, based on individualized findings on the record, and must be narrowly tailored to achieve the compelling interestafter alternatives have been considered by the court. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). For a thorough overview of the Supreme Court's development of the *Richmond Newspapers/Globe Newspaper/Press-Enterprise II* test and its application by military courts, see Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.

140. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993). The preliminary hearing was similar in scope, procedure, and importance to the California probable cause preliminary hearing addressed in *Press-Enterprise II.*

141. *Id.* at 149.

142. *Id.*

udice to the defendant is a legitimate interest, it must be determined on a case-by-case basis.[143]

The Supreme Court has never held that the media has a First Amendment right of access to all pretrial proceedings or other judicial proceedings involving disposition of criminal misconduct.[144] The Supreme Court has recognized that, *in the discretion of the trial judge*, in-camera reviews and closed evidentiary hearings may be appropriate to determine admissibility of a sexual offense victim's behavior or sexual predisposition, or admissibility of unreliable or illegally obtained evidence.[145] Transcripts of in-camera conferences and other closed proceedings must be released once the interest justifying the in-camera proceeding no longer exists.[146]

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143. *Id.* at 150.

144. Both the Federal and Military Rules of Evidence 412(c) mandate closed hearings to determine relevance, in nonconsensual sexual offenses, of victims behavior or sexual predisposition. *See* MCM, *supra* note 24, MIL. R. EVID. 412(c), FED. R. EVID. 412 (c). Many states have statutes mandating closure for juvenile defendants. The Supreme Court has, thus-far, left these statutes undisturbed, even though such mandatory closures are unconstitutional under the rationale of *Globe Newspaper Co.*, 457 U.S. 596 (1982). *See* United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995) (denying public access to juvenile arraignment and interpreting the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042, to allow, but not require, closure). This case questions whether there is a First Amendment right of access to juvenile proceedings because they have historically not been open and the Supreme Court has never extended First Amendment jurisprudence applicable to adult cases to juveniles. *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 612 (Burger, J., dissenting) ("Although states are permitted to mandate the closure of all proceedings in order to protect a 17-year old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused."). *See generally* Paul S. Grobman, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271 (1986) (discussing the conflict between mandatory rape shield closures and the First Amendment right of access to criminal proceedings and concluding that mandatory closure does not violate the First Amendment).

145. *See Globe Newspaper Co.*, 457 U.S. at 609 n.25. For the case-by-case approach to be meaningful, the media and the public must be heard on the questions of closure. This opportunity to be heard does not mean that a trial court may not protect a minor victim by denying the media an opportunity to confront or cross examine the victim or by denying the media access to sensitive details about the victim or his future testimony. This discretion is consistent with the traditional authority of trial judges to hold in-camera conferences. In so stating, *Globe Newspaper Co.* cited *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), a case decided prior to *Waller v. Georgia*, where a plurality recognized noFirst Amendment right of access for media to pretrial suppression hearing when the parties agree to closure. *Id.*

146. *See Gannett Co.*, 443 U.S. at 400 (holding that closure should be only to the extent necessary to protect the asserted interest and that transcripts of closed proceedings

In-camera conferences between judges and counsel to discuss administrative rather than adjudicative matters should not be considered trial proceedings triggering a media right of access.[147] However, parties to a trial may not thwart the media's access to criminal proceedings by litigating issues that should be addressed in open court in chambers.[148]

Media access to other pretrial or judicial proceedings in criminal cases depends on whether the proceeding is, in fact, a pretrial proceeding or a proceeding involving disposition of criminal misconduct.[149] If the proceeding is adjudicative, the First Amendment right of access attaches if the proceeding has been historically open[150] and if the public plays a particularly significant positive role in the proceeding (the experience/logic test).[151]

Finally, in each of the four Supreme Court cases establishing a right of access to trial and pretrial proceedings, the interest asserted to support closure was found compelling.[152] The problem in each case was that the

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146. (continued) should be unsealed after the reason for closure has passed); United States v. Valenti, 999 F.2d 1425 (11th Cir. 1993); United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir. 1982).

147. *See* United States v. Gonzalez, 150 F.3d 1246, 1259 (10th Cir. 1998) (upholding ex parte, in-camera proceedings under the Criminal Justice Act, 18 U.S.C. § 3006A, by court appointed defense counsel to request investigative, expert, or other services necessary for an competent defense). The court found no history of openness and that the public would frustrate the process because the purpose of the ex parte, in-camera hearing is not to reveal the strengths and weaknesses or the trial strategy of a defendant's case. *Id.*

148. *See* NBC v. Superior Court, 980 P.2d 337 (Cal. 1999) (discussing cases where parties have abused in chambers conferences by using them to discuss substantive issues, such as motions in limine).

149. *Id.*; *see also* United States v. McVeigh, 918 F. Supp. 1452, 1459 (W.D. Okla. 1996) (explaining that a "trial" begins with the appearance of a defendant in response to a criminal complaint, indictment, or information begins the adversary process).

150. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9 (*Press-Enterprise II*) (citing the grand jury is an example of a traditionally closed proceeding where the public would play a negative role in its functioning). *See also* United States v. Gonzales, 150 F.3d at 1259 (holding that ex parte, in-camera proceedings under the Criminal Justice Act, 18 U.S.C. § 3006A by court appointed defense counsel to request investigative, expert, or other services necessary for an competent defense fail the experience/logic test).

151. *Press-Enterprise II*, 478 U.S. at 10-13 (1986). Several circuits have applied the two-part test to find a qualified First Amendment right to guilty plea hearings. *See* Tammy Hinshaw, *Right of Access to Federal District Court Guilty Plea Proceeding or Records Pertaining to Entry or Acceptance of Guilty Plea in Criminal Prosecution*, 118 A.L.R. FED. 621 (1994).

152. *Press-Enterprise II*, 478 U.S. at 1 (accused's right to fair trial); Waller v. Georgia, 467 U.S. 39 (1984) (government interest not to taint wiretap evidence for future

trial court issued sweeping, over broad closure orders that did not target the interest the state sought to protect. In *Richmond Newspapers*, the entire trial was closed to protect the accused's right to fair trial.[153] In *Globe Newspaper Co.*, the state statute required mandatory closure during the testimony of a minor victim in a sex offense regardless of whether the victim desired closure.[154] In *Press-Enterprise I*, the entire individual voir dire of almost six weeks was closed and the transcript sealed, even though the trial judge opined that the majority of the information did not involve juror privacy.[155] In *Waller*, the entire seven-day suppression hearing was closed, over the objection of the accused, even though the playing of the wiretap evidence took only two and one-half hours.[156] In *Press-Enterprise II*, the entire forty-one day preliminary probable cause hearing was closed to protect the accused's right to a fair trial even though the defense did not move to suppress any evidence.[157]

The message the Supreme Court is sending is that there are a variety of interests that are compelling and may justify limited closure. To survive appellate review, the trial court must support the compelling interest conclusion with case-by-case findings as to why the interest is compelling, what alternatives have been considered and rejected, and why *limited* closure is necessary, narrowly tailored, and specifically targeted to protect the compelling interest.[158] Had the trial courts in *Richmond Newspapers*, *Globe Newspaper Co.*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II* gone through this analysis and limited the periods of closure, the cases may have been affirmed.[159]

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152. (continued) prosecutions and privacy interests of third parties in the wiretaps); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) (juror privacy); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (physical and psychological well-being of minor victim).

153. *Richmond Newspapers, Inc.*, 448 U.S. at 564.

154. *Globe Newspapers Co.*, 457 U.S. at 607-10.

155. *Press-Enterprise I*, 464 U.S. at 513.

156. *Waller*, 467 U.S. at 42.

157. *Press-Enterprise II*, 478 U.S. at 4.

158. Improper closure over the accused's objection, violates his Sixth Amendment right to public trial and results in automatic reversal. *See supra* note 108.

159. The facts in *Richmond Newspaper* and *Press-Enterprise II*, do not indicate that the defendant's right to fair trial was threatened (the asserted interest supporting closure). In these cases, limited closure probably would not be supported by the record.

D. Military Courts

1. Post-Referral Proceedings

Rule for Courts-Martial 103(8) defines a court-martial proceeding to include the trial on the merits and all post referral pretrial and extra-trial sessions under Article 39(a).[160] The CAAF[161] and the intermediate service courts of criminal appeal hold that the First Amendment right of access to criminal trials applies to courts-martial.[162] The definition of a court-martial includes all Article 39(a) sessions, thus, the media has a right of access under the First Amendment to Article 39(a) sessions as well as to trial proceedings.[163] The media also has standing to complain if access is denied.[164] Military courts apply the strict scrutiny First Amendment analysis set forth by *Richmond Newspapers*/*Globe Newspaper Co.*/*Press-Enterprise I and II* (compelling interest/individualized findings/narrowly tailored test) to closures of the trial or Article 39(a) sessions.[165]

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160. *See* MCM, *supra* note 24, R.C.M. 103(8) (defining court-martial). An Article 39(a) session is a hearing outside the presence of the court-members anytime after charges have been referred to determine motions, objections, matters ruled upon by the military judge, procedural issues, and, arraignments and pleas if permitted by service regulations. *See* UCMJ art. 39(a).

161. *See* discussion *supra* note 39.

162. United States v. Travers, 25 M.J. 61 (C.M.A. 1987). The right to public access to criminal trials extends to courts-martial. The compelling interest/individualized findings/narrowly tailored means test must be met to justify closure. *Id.* at 62.

163. *See id. See also* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997); United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) ("It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials.").

164. *ABC, Inc.*, 47 M.J. at 365 ("When an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied.").

165. *See id.*; United States v. Anderson, 46 M.J. 728 (Army Ct. Crim. App. 1997) (holding it to be abuse of discretion to close part of a trial without adequate justification); United States v. Story, 35 M.J. 677 (A.C.M.R. 1992) (declining to uphold closure of a providence inquiry where the trial court did not use the compelling interest/individualized finding/narrowly tailored test). The individualized findings to justify the compelling interest differ depending on the type of interest proffered. *Compare* United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd in part set aside in part*, 35 M.J. 396 (C.M.A. 1992) *with* United States v. Terry, 52 M.J. 574 (N.M. Ct. Crim. App. 1999). *Lonetree* was a national security case where the military judge was not required to make individualized findings justifying each closed session where classified information would be disclosed. The court held that closure based on classified information required individualized findings that the information disclosed is classified, however, once the finding is made, closure is appropriate for each disclosure. In *Terry*, the court held that the government must do a case-by-case analysis to balance concern for protection of a victim against the accused's right to public trial. *See also* United States v. Hershey, 20 M.J. 433 (C.M.A. 1985). For an over-

Rule for Courts-Martial 806 governs public trials in the military.[166] Rule for Courts-Martial 806(b) (control of spectators)[167] authorizes miltary judges to close a session of a court-martial to maintain the dignity and decorum of the proceedings or for other good cause unless the accused objects.[168] Military judges have limited authority to close a court-martial session over the objection of the accused.[169] No session may be closed over the objection of the accused unless closure is expressly authorized by *another* provision of the manual.[170] The only *Manual* provision authorizing closure during a trial is Military Rule of Evidence (MRE) 505(j), which authorizes closure of trial proceedings when classified information is to be introduced.[171] Only four *Manual* provisions expressly authorize closure of an Article 39(a) session.[172] Military Rule of Evidence 412(c) requires closure in cases of nonconsensual sexual offenses, for hearings to deter-

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165. (continued) view of the Supreme Court's development of the *Richmond Newspapers/Globe Newspaper Co./Press-Enterprise I and II* test and its application by military courts, see Kulish, *supra* note 139, at 1.

166. MCM, *supra* note 24, R.C.M. 806 (Public Trial).

167. *Id.* R.C.M. 806(b). The discussion distinguishes between closure–no member of the public allowed to attend–and exclusion–certain individuals excluded from an open proceeding. Sessions of a court-martial may not be closed over the objection of the accused unless expressly authorized by another provision of the manual but exclusion of certain people by the military judge does not constitute closure. This contrasts with federal circuit decisions classifying exclusions of one or more persons as "partial closures" that must be justified by either a compelling interest or by a substantial reason, depending on the circuit. *See supra* note 128.

168. *Id.*

> R.C.M. 806 (b) Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

Id.

169. *Id.* The discussion states that sessions may not be closed over the objection of the accused unless expressly authorized by another provision of the manual but exclusion of certain people by the military judge does not constitute closure. *See* federal circuit cases, *supra* note 128.

170. *Id.*

171. *Id.* MIL. R. EVID. 505(j); *id.* R.C.M. 806(b) analysis, app. 22, at A21-46.

172. *Id.* MIL. R. EVID. 412(c) (nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition); *id.* MIL. R. EVID. 505(i) (classified information); *id.* MIL. R. EVID. 506(j) (government privileged information other than classified).

mine admissibility of the victim's behavior or sexual predisposition.[173] Military Rule of Evidence 505(i) and (j) allow, but do not require, military judges to close an Article 39(a) session or trial during the portion of the trial where classified information is to be disclosed.[174] Military Rule of Evidence 506(i) allows, but does not require, in-camera Article 39(a) sessions to determine whether there is information that is subject to a governmental privilege.[175] There is no authority under the *Manual* to close a trial, over the objection of the accused, for any other reason, to include protecting a victim, adult, or child from trauma, embarrassment, inability to testify in public, or retaliation.[176]

Notwithstanding the literal language of R.C.M. 806, military appellate courts have consistently held that military judges have authority to close a session of a court-martial over the objection of the accused to pro-

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173. *Id.* MIL. R. EVID. 412(c). The rule also provides that the motion, related papers, and record for the hearing be closed, unless the court orders otherwise. Because MRE 412(c) mandates closure, it, arguably, violates the First Amendment as interpreted by *Globe Newspaper Co. See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding mandatory closure of trial during testimony of minor victims of sex offenses unconstitutional because it is not narrowly tailored to compelling state interest of protecting physical and psychological well-being of minor victims). *But see id.* n.25 (explaining that courts can protect minor victims by denying the press access to sensitive details concerning the victim and the victim's future testimony). The court found such discretion consistent with the traditional authority of trial judges to conduct in-camera conferences and that without such trial court discretion, a State's interest in safeguarding the welfare of minor victims would be defeated before it could be litgated. *Id.* Defense counsel should always consider objecting to any hearing closed pursuant to MRE 412(c) as violating the accused's Sixth Amendment right to public trial. Defense counsel should also consider the same objection to any motion by the government to close any part of a court-martial or an Article 32 investigation. The Supreme Court has determined that violating the accused's Sixth Amendment right to public trial is a structural defect requiring automatic reversal if the accused objects. *See supra* note 108. *See also* Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999) (finding failure by appellate counsel to brief and argue that the trial was improperly closed over the accused's objection to be ineffective assistance of counsel).

174. MCM, *supra* note 24, R.C.M. 505(i), (j).

175. *Id.* R.C.M. 505(i), 506(i).

176. R.C.M. 806 appears to give the military judge authority to reduce access in an open trial, over the objection of the accused, by excluding part of the audience. The nonbinding discussion following R.C.M. 806 states:

> Access may be reduced when no other means is available to relieve inability to testify due to embarrassment or extreme nervousness . . . . Occasionally the defense and prosecution may agree to request a closed session to enable a witness to testify without fear of intimidation or acute embarrassment, or to testify about a matter which, while not classified, is of a sensitive or private nature. Closure may be appropriate in such

tect the welfare of an alleged victim of a sexual assault if the *Richmond Newspapers/Globe Newspaper Co.* compelling interest/individualized findings/narrowly tailored test is met. In *United States v. Hershey*, the military judge, during the testimony of the thirteen-year-old victim in a child sex abuse case, closed the trial over the objection of the accused.[177] The CAAF held the closure improper because it was supported only by counsel proffer, not by evidence that closure was necessary to protect this particular victim from trauma or embarrassment. The trial court also failed to consider whether alternatives to closure could protect the victim.[178] *Hershey* is significant because the Court of Military Appeals, citing *United States v. Grunden*,[179] stated that military judges have authority to close limited portions of a trial over defense objection whenever the court determines that there is a compelling interest supported by individualized findings and closure is narrowly tailored to protect the compelling interest after considering and rejecting alternatives to closure.[180] *Grunden* involved closure to protect classified national security information, the only specific area the *Manual* expressly authorizes closure of trial over the objection of the accused.[181]

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176. (continued)

> cases, but the military judge must carefully examine the reasons for the request and weigh them against the public's interest in attending courts-martial. Excluding only part of the public may be more appropriate in some cases.

Id. R.C.M. 806 (discussion). *Cf.* ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) (declining to agree that requiring a witness to testify about personal sexual history plainly does not qualify as a basis to close a pretrial hearing or court-martial). Federal courts have called this type of reduced access "partial closure." The circuits are divided over whether the interest required to justify partial closures needs to be "compelling" or "substantial." Such partial closures over the accused's objection have been reversed for violating the accused's Sixth Amendment right to public trial. *See supra* note 128.

177. United States v. Hershey, 20 M.J. 433, 435-36 (C.M.A. 1985).

178. *Id.* The CAAF held that when the accused's Sixth Amendment right to public trial has been violated, the accused does not have to prove specific prejudice to obtain relief. Nevertheless, the CAAF affirmed *Hershey*, finding that only two people (the bailiff and the escort) were asked to leave the courtroom. Because both were performing a government function at the trial and were not attending as spectators, the practical effect of closure was minimal.

179. 2 M.J. 116 (C.M.A. 1977).

180. *Hershey*, 20 M.J. at 436.

181. MCM, *supra* note 24, R.C.M. 806(b), MIL. R. EVID. 505.

In 1999, the Navy-Marine Corps Court of Military Review reversed a sexual assault case because the accused's Sixth Amendment right to public trial was violated. In *United States v. Terry*, the military judge closed the trial during the testimony of the twenty-year-old alleged victim. Like *Hershey*, the closure was based solely on the proffer of counsel and not on any evidence that closure was necessary to protect the witness in this case.[182] The Navy-Marine court in *Terry*, citing *Hershey* and *ABC, Inc. v. Powell*,[183] stated that military judges have authority to close sessions of a court-martial over defense objection if the government can demonstrate a compelling interest based on individualized findings and the closure is narrowly tailored to protect that interest.[184]

Hershey and *Terry* correctly cite the constitutional test for closures. They wrongly assume that military judges have authority to close a court-martial, over the objection of the accused, to protect an alleged victim. The impediment to closure is not the First or the Sixth Amendments to the Constitution. It is the language of R.C.M. 806. The rule clearly states, "a session may be closed over the objection of the accused only when expressly authorized by another provision in the *Manual*."[185] The only provision that authorizes closure to protect victims is MRE 412(c)(2). This rule mandates closed Article 39(a) sessions to determine whether evidence of a victim's other sexual behavior or sexual predisposition is admissible in a nonconsensual sexual offense case. If the evidence is deemed admissible, MRE 412(c)(2) provides no additional authority to close the trial during the victim's testimony about sexual behavior, predisposition, or anything else.

ABC, Inc. v. Powell is inapposite because it addresses Article 32 closures. A different rule, R.C.M. 405(h)(3), governs access by spectators to Article 32 investigations. This rule, unlike R.C.M. 806(b), does not limit the circumstances when an Article 32 investigation can be closed over the accused's objection.

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182. United States v. Terry, 52 M.J. 574 (N.M. Ct. Crim. App. 1999). Unlike *Hershey*, in *Terry* the conviction was reversed because there were spectators who were removed from the courtroom during the closure.

183. 47 M.J. 363 (1997) (holding that victim testimony about personal sexual history can be a compelling interest justifying closure of an Article 32 investigation if based on individualized findings).

184. *Terry*, 52 M.J. at 576.

185. The closure in *Globe Newspaper Co.* to protect the minor victim was pursuant to a state statute mandating closure in such cases. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

Rule for Courts-Martial 806(b) should be amended for several reasons:

(1) The literal language of R.C.M. 806 allows the military judge to close trial and pretrial proceedings for good cause without employing the compelling interest/individualized findings/narrowly tailored test. Both the Supreme Court and military courts have clearly ruled that closure of criminal proceedings without employing strict First Amendment scrutiny is an unconstitutional violation of the media's First Amendment right of access to criminal proceedings and the accused's Sixth Amendment right to public trial. The number of military cases where appellate courts have chastised the trial court's failure to follow the compelling interest/individualized findings/narrowly tailored test prior to closure shows that R.C.M. 806(b) is misleading and needs to be amended to include the requirement for heightened First Amendment scrutiny.[186]

Certainly, there are cases where closure in whole or in part may well be justified.[187] The problem with the current language of R.C.M. 806 is that it lulls trial courts into closing proceedings based on counsel proffers of "good cause" to justify closure. These cases face reversal on appeal because findings supporting the justification for closure is not in the record of trial. Rule for Courts-Martial 806 should be amended to require trial courts to make on the record findings showing how the compelling interest/individualized findings/narrowly tailored analysis was applied prior to closure.

(2) With the compelling interest/individualized findings/narrowly tailored means test added to R.C.M. 806, there is no reason to further limit closures where the accused objects. Reasons, such as protecting a victim from trauma, have been declared by both the Supreme Court and by the CAAF to be compelling interests that justify closure if supported by individualized findings.[188] Closure may be justified to protect a victim even if the accused objects.

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186. *See* United States v. Hershey, 20 M.J. 433 (C.M.A. 1985); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977); *Terry*, 52 M.J. at 574; United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998); United States v. Anderson, 46 M.J. 728 (Army Ct. Crim. App. 1997); United States v. Story, 35 M.J. 677 (A.C.M.R. 1992); United States v. Nunez-morales, No. ACM 30476, 1994 CMR LEXIS 50 (A.F.C.M.R. Feb. 18, 1994); United States v. Fiske, 28 M.J. 1013 (A.F.C.M.R. 1989); United States v. Czarnecki, 10 M.J. 570 (A.F.C.M.R. 1980).

187. *See ABC, Inc.*, 47 M.J. at 365 (holding that victim testimony about personal sexual history can be a compelling interest justifying closure of an Article 32 investigation if based on individualized findings).

188. *See id.*; *Hershey*, 20 M.J. at 436; *Terry*, 52 M.J. at 574.

(3) Both the Supreme Court and the CAAF have held that the media has standing to challenge closure orders.[189] Rule for Courts-Martial 806 is silent on the issue of media standing. Neither the discussion nor the analysis of the rule addresses media standing.

2. Pre-Referral Proceedings

There are proceedings, other than Article 32 investigations, such as seven-day pretrial confinement reviews or depositions, that may occur prior to referrals.[190] The *Manual for Courts-Martial* is silent on the issue of openness for such pre-referral proceedings. There have been no reported military cases where the press or the accused has challenged a closure of a seven-day confinement review or a deposition. Federal circuit cases have found a First Amendment right of access to bail hearings.[191]

In *United States v. Edwards*, *United States v. Chagra*, and *In re Globe Newspapers*, the District of Columbia, Fifth, and First Circuits, respectively, determined that the same societal interests supporting open trial proceedings support open bail hearing proceedings. These courts found that pretrial release proceedings involve decisions that benefit by public scrutiny. The decision to release a fugitive who subsequently flees may effectively end the criminal proceedings. The decision to confine someone deprives that person of his liberty. Public scrutiny acts to ensure that the decision to confine, to impose pretrial restrictions, or to release is made properly.[192] Civilian bail hearings and military seven-day reviews perform

189. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); *ABC, Inc.*, 47 M.J. at 363 ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied."). *See also* Washington Post v. Robinson, 935 F.2d 282, 290 (D.C. Cir. 1991) (holding that the press and the public should have notice of closure in order to have an opportunity to raise a First Amendment right of access claim).

190. MCM, *supra* note 24, R.C.M. 305(i)(2) (seven-day review of pretrial confinement). The proceeding includes a review of the confinement memorandum by the accused's commander and matters submitted by the accused. The accused and counsel may appear before the reviewing officer and make a statement, if practicable. *Id.* R.C.M. 305(i)(2)(A)(i). *See also id.* R.C.M. 702 (depositions). Depositions may be ordered after the preferral of charges. *Id.* R.C.M. 702(a).

191. *See In re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) (finding media right of access to bail hearings and documents); United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (finding right of access to bail hearings); United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc) (finding right of access to pretrial detention hearings).

192. *In re Globe Newspaper Co.*, 729 U.S. at 52.

the similar function of determining whether confinement is necessary due to the accused's dangerousness or likelihood of flight.

An argument can be made that the media has no First Amendment right of access to military seven-day pretrial confinement reviews because they have not been traditionally open. This argument relies on the silence of R.C.M. 305(i)(2) on the openness issue, that military confinement reviews, unlike civilian confinement reviews, are not proceedings conducted before a court,[193] and that the media has access to post-referral reviews of pretrial confinement by the military judge.[194] The stronger argument favors a media First Amendment right of access to military seven-day pretrial confinement reviews because the experience/logic value of openness that holds true for civilian bail hearings is also true for military seven-day pretrial confinement reviews.

Both *Chagra* and *In re Globe Newspaper* recognized bail determinations resulting in release of the accused are often made outside of court through informal procedures. Both courts emphasized that the First Amendment right of access to hearings concerning pretrial release would extend to such informal determinations resulting in expeditiously freeing an accused.[195] This rationale should also apply to the military forty-eight-hour probable cause reviews.[196] The media First Amendment right of access should extend only to hearings reviewing pretrial confinement, not to the initial order of confinement or the forty-eight-hour review.[197]

The Supreme Court has defined pretrial depositions as discovery material that is not required to be accessible to the media under the First Amendment.[198] Nevertheless, the media has intervened in federal cases to

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193. MCM, *supra* note 24, R.C.M. 305(i)(2) (noting that the seven-day review is to be conducted by a neutral and detached officer appointed by service regulations). *See also id.* R.C.M. 305(i) analysis, app. 21 at A21-18 – A21-19 (noting that the seven-day review is a limited proceeding that does not require an adversary hearing).

194. *Id.* R.C.M. 305(j) (review by military judge). After referral military judge reviews propriety of pretrial confinement if requested by motion to do so.

195. *Id.* at 51; *Chagra*, 701 U.S. at 362-63.

196. *See* MCM, *supra* note 24, R.C.M. 305(i) (providing for a 48-hour review, by a neutral and detached officer, of the adequacy of probable cause). *See generally* United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

197. Reviews of confinement by a military judge occur in an Article 39(a) session after a case is referred, thus, the media has a First Amendment right of access to these reviews.

198. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (opining that discovery, pretrial depositions, and pretrial interrogatories are not public components of a trial subject).

argue that the First Amendment right of access attaches to depositions and that the media should be able to attend the proceedings.[199] The most recent circuit cases have continued to view depositions as discovery, rather than as a trial proceeding to which the First Amendment right of access attaches.[200]

4. In-Camera Proceedings

Rule for Courts-Martial 701(g)(2) provides for in-camera review upon motion by a party for an order that discovery be denied, restricted, or deferred.[201] If the military judge grants relief, the motion and information inspected is sealed by the military judge and forwarded for review in closed session.[202] Although appellate courts have unsealed records sealed by trial courts, there is no requirement for military trial or appellate courts to conduct any post-trial review of sealed records to determine whether the interest that justified the sealing is no longer threatened.[203] Additionally,

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199. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998).

200. *Id.* at 510-13; *see also* United States v. McDougal, 103 F.3d 651, 659 (8th Cir. 1996), *cert. denied*, Citizens United v. United States, 522 U.S. 809 (1997) (finding the First Amendment satisfied where the public and the press hear the contents of the deposition in open court). There have been cases suggesting that the First Amendment right of access attaches to deposition proceedings. *See* United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990). For an excellent analysis of circuit cases involving video and audiotaped depositions, see Angela M. Lisec, Casenote: *Access to President Clinton's Videotaped Testimony Denied: The Eighth Circuit Addresses the Common Law and Constitutional Rights of Access to Judicial Records in United States v. McDougal*, 31 CREIGHTON L. REV. 571 (1998).

201. MCM, *supra* note 24, R.C.M. 701(g)(2).

202. *See* United States v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App 1999) (holding that the military judge should conduct in-camera inspection of records allegedly impacting on victim credibility and attach a sealed copy to the record of trial); United States v. Rivers, 49 M.J. 434 (1998) (finding military judge properly refused on grounds of privilege, after in-camera review, to unseal statements made by confidential government informant and entries into the investigating agent's summary). *See also* California v. Ritchie, 480 U.S. 39 (1987) (sanctioning the use of in-camera review).

203. *See* United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) (vacating, sua sponte, trial court seal of stipulation of fact where sealing was not justified by compelling interest/individualized findings/narrowly tailored means test). Under the rationale of *ABC, Inc. v. Powell*, military appellate courts have authority to entertain a motion for by a party, or the media, to unseal records. *See* 47 M.J. 363 (1997) (granting petition for extraordinary relief by media and accused to open Article 32 investigation regarding SGM (Ret.) McKinney).

after a courts-martial has been dissolved, the record of trial is maintained by the military services and not by the court.[204]

The Freedom of Information Act (FOIA)[205] and Privacy Act (PA)[206] govern releases of government information, including information in records of trial to the media.[207] Neither FOIA nor the PA give agencies express authority to unseal courts-martial records. It is unclear, what, if any authority the services have under FOIA to release records in agency custody that have been sealed during a court-martial.[208]

d. In Chambers Conferences

Rule for Courts-Martial 802 authorizes, at the discretion of the trial judge, post-referral conferences between the military judge and the parties that are not made part of the record.[209] The conferences are intended to resolve administrative matters and resolve matters to which the parties agree.[210] Neither R.C.M. 802 nor the accompanying discussion provides

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204. The Privacy Act System Notice Requirement Applies to Court-Martial Files, Op. Dep't of Defense Privacy Board, No. 32 *available at* <http://www.defenselink.mil/privacy/opinions/op0032.html>.

205. The FOIA was amended in 1996. *See* 5 U.S.C.S. § 552 (LEXIS 2000). The Department of Defense has implemented FOIA through directives, programs, and regulations. *See* U.S. DEP'T OF DEFENSE, DIR. 5400.7, DEP'T OF DEFENSE FREEDOM OF INFORMATION ACT PROGRAM (13 May 1988); DEP'T OF DEFENSE REG. 5400.7-R, DEP'T OF DEFENSE FREEDOM OF INFORMATION PROGRAM (22 May 1997) (includes 1996 amendments to FOIA). The Army, Air Force, Navy, and Marine Corps have their own FOIA regulation. None include the 1996 amendments. *See* U.S. DEP'T OF ARMY, REG. 25-55, THE DEP'T OF ARMY FREEDOM OF INFORMATION ACT PROGRAM, (14 Apr. 1997); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 37-131, AIR FORCE FREEDOM OF INFORMATION ACT PROGRAM (31 Mar. 1994, updated 16 Feb. 1995); U.S. DEP'T OF NAVY INSTR. 5720.42E, DEP'T OF NAVY FREEDOM OF INFORMATION ACT PROGRAM (5 June 1991); U.S. MARINE CORPS, ORDER 5720.63, AVAILABILITY TO PUBLIC OF MARINE CORPS RECORDS (26 Feb. 1985).

206. 5 U.S.C.S. § 552a.

207. This article focuses on media rights of access to criminal proceedings, to judicial records in pending criminal cases, and to trial participants. The particulars of obtaining release of records of trial under FOIA after the trial is over is beyond the scope of the article. The potential conflict between FOIA release balancing and the media First Amendment access is discussed *infra* Section IV.E.4.

208. *See Scott*, 48 M.J. at 664, n.3.

209. *See* MCM, *supra* note 24, R.C.M. 802 (Conferences). This rule states:

> (a) *In general.* After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

for the conferences to be closed. In practice, they are closed. The rule implies closure by providing that matters agreed upon at a conference shall be included into the record orally or in writing.[211] To date there have been no media challenges to the closed conferences. The discussion to R.C.M. 802 states that issues in addition to administrative matters may be resolved during conferences if the parties consent and the resolution of the conference is placed in the record.[212] This language should not be interpreted to allow trial courts to avoid media access by conducting, in chambers, criminal proceedings in which the First Amendment right of access attaches.

e. Appellate Proceedings

The media's First Amendment right of access and the accused's Sixth Amendment right to public trial do not apply to appellate reviews by military courts.[213] In *United States v. Schneider*, the accused argued that he was denied a public trial because some of his friends and some military

209. (continued)

> (b) *Matters on record.* Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement.
> (c) *Rights of parties.* No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.
> (d) *Accused's presence*. The presence of the accused is neither required nor prohibited at a conference.
> (e) *Admission.* No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.
> (f) *Limitations.* This rule shall not be invoked in the case of an accused who is not represented by counsel, or in special court-martial without a military judge.

Id.

210. *Id.* R.C.M. 802(a) discussion.

211. *Id.* Contrast the provision for oral or written inclusion with Federal Rule of Criminal Procedure 17.1 (Pretrial Conference) which requires the court to prepare a memorandum of agreed upon matters to be included in the record. *See* FED. R. CRIM. P. 17.1. *See also* MCM, *supra* note 24, R.C.M. 1103(b) (discussion) (Preparation of Record of Trial) ("Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences must be included in the record.").

212. MCM, *supra* note 24, R.C.M. 802 discussion.

213. United States v. Schneider, 38 M.J. 387 (C.M.A. 1993).

lawyers not affiliated with the case were denied access to the oral argument of the case in front of the Army Court of Military Review.[214] The Court of Military Appeals (COMA) rejected Schneider's argument that appellate review was like a trial and closure should be subject to the same strict First Amendment scrutiny. The COMA found that appellate court determinations are conducted in-camera and that an accused had no right to oral argument. Because appellate courts base their review on the record of trial and do not conduct evidentiary hearings, they are not public trials.[215] The COMA did not apply the experience/logic test in its decision but the essence of the decision was to hold that appellate reviews fail the experience prong because they are not traditionally open.

E. Access to Pretrial Investigations

1. Grand Jury Investigations

Probable cause determinations allowing a criminal case to proceed to trial may be made by a grand jury indictment or by a finding of probable cause by a judge or magistrate in a preliminary probable cause hearing.[216] While the First Amendment right of access attached to preliminary probable cause hearings, it does not attach to grand jury investigations because they fail the experience/logic test.[217] A long line of Supreme Court cases justify grand jury secrecy for the following reasons: (1) prospective witnesses will hesitate to come forward knowing that those against whom they testify would be aware of the testimony, (2) grand jury witnesses would be less likely to testify fully and frankly because they would be open to retribution or inducement, (3) targets would be more likely to flee or try to unlawfully influence the grand jury, and (4) targets investigated and exonerated would be subject to ridicule.[218] Under the Federal Rules of

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214. *Id.* at 396-97. Approximately 20 spectators attended the oral argument. The government was advised that there would be press interest. To control order in the courtroom during the argument and to maximize access by spectators, the government placed extra chairs in the courtroom but did not allow entry or exit after arguments began.

215. *Id.* at 397 n.7 (citing United States v. Spurlin, 33 M.J. 443, 444-45 (C.M.A. 1991)).

216. Press-Enterprise II, 478 U.S. 1, 12 (1986). *See also* FED. R. CRIM. P. 6 (providing that federal grand jury investigations are conducted in secret proceedings, closed to the public and media).

217. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*); *In re* Subpoena to Testify before Grand Jury, 864 F.2d 1559 (11th Cir. 1989).

Criminal Procedure (FRCP), grand juries must convene in secret with very limited allowable disclosure of grand jury information.[219]

2. Article 32 Investigations

Unlike FRCP 6(e),[220] which mandates closed grand jury investigations, R.C.M. 405(h)(3) (Access by spectators) provides that public and press access to military pretrial Article 32 investigations may be restricted or closed in the discretion of the commander who directed the investigation or the investigating officer.[221] The non-binding discussion states that

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218. *See* United States v Sells Eng'g, Inc., 463 U.S. 418 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

219. FED. R. CRIM. P. 6(e) (Recording and disclosure of [Grand Jury] Proceedings). Subsections (2), (5), and (6) are the secrecy provisions. These subsections provide as follows:

> (2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, at attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court. (5) *Closed Hearing.* Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. (6) *Sealed Records.* Records, orders, and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

Id. See also In re Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998), *cert. denied*, Dow Jones & Co. v. Clinton, 525 U.S. 820 (1998) (holding that no media First Amendment right of access to portions of ancillary grand jury proceedings not involving matters occurring before the grand jury).

220. *Id.*

221. MCM, *supra* note 24, R.C.M. 405 (Pretrial investigation); UCMJ art. 32 (LEXIS 2000). The non-binding discussion states that ordinarily Article 32 proceedings should be open to the public. It also provides for closure to encourage complete testimony by an embarrassed or timid witness. Distinguish R.C.M. 806 (Public trial), which does not provide for closure of trial/pretrial proceedings for this reason over the objection of the accused.

"ordinarily [an Article 32] should be open."[222] Before 1997, no case defined the scope of discretion to hold an open or closed Article 32.[223]

In 1997, the CAAF decided *ABC, Inc. v. Powell*,[224] a case in which the Article 32 investigation concerning the sexual misconduct charges preferred against then Sergeant Major of the Army (SMA), Gene C. McKinney, was closed over the objection of the accused and the media. The CAAF held that an accused had a Sixth Amendment right to a public Article 32 investigation, notwithstanding the language of R.C.M. 405(h)(3).[225] The CAAF then went on to state that when the accused has a right to a public hearing, the press enjoys the same right and "has standing to complain if access is denied."[226] When the accused requests an open Article 32 investigation, the proceedings must be open unless the court applies the *Richmond Newspapers/Globe Newspaper Co./Press-Enterprise I and II* compelling interest/individualized findings/narrowly tailored means test.[227]

ABC, Inc. did not directly address whether the media has a First Amendment right of access to Article 32 investigations that is independent of the accused's Sixth Amendment to a public trial.[228] If so, the media has a First Amendment right of access to an Article 32 investigation even if the accused waives his Sixth Amendment right to an open proceeding.[229] Whether the media has an independent First Amendment right of access to Article 32 investigations depends on whether Article 32 investigations pass the experience/logic test.[230]

Article 32 investigations are frequently analogized to grand jury proceedings. In actuality, Article 32 investigations more closely resemble pre-

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222. *Id.*

223. *See* San Antonio Express-News v. Morrow, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996). In this case, the media petitioned for extraordinary writ of mandamus to allow public access to Article 32 closed over defense objection. The Air Force court declined to issue a mandamus order stating that the investigating officer exercised reasoned discretion and while Article 32 investigations are presumptively public, the standards for weighing competing interests in deciding whether to close a hearing is a developing area of the law subject to differing interpretations.

224. 47 M.J. 363 (1997).

225. *Id.* at 365.

226. *Id.*

227. *Id.*

228. In *ABC, Inc.*, both the accused and the media objected to closure. *See id.*

229. *Id.* ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied.").

230. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

liminary probable cause hearings than grand jury investigations. This is critical for First Amendment access analysis because grand jury investigations are traditionally closed while preliminary probable cause hearings are traditionally open.[231]

None of the four traditionally articulated factors justifying grand jury closure are present in Article 32 investigations.[232] Grand juries are responsible for determining whether a crime has been committed.[233] They have broad powers to inquire into all information potentially bearing on its investigation and may continue to investigate until satisfied that a crime has been committed or that a crime has not been committed.[234] A target need not be identified. The purpose of an Article 32 investigation is to investigate specific charges preferred against a specific accused.[235] The accused has the right to be informed of the witnesses and other evidence known to the investigating officer.[236] Thus, the concerns about witness testimony are not present in Article 32 investigations because the accused knows who the witnesses against him are. The concerns about the accused's likelihood to flee or unlawfully impede the investigation, or about the accused's reputation if exonerated are also not present in Article 32 investigations. The accused knows about the investigation and has the right to attend it.[237] Any stigma to the accused based on alleged association with the criminal activity being investigated has already occurred upon preferral of charges. Unlike grand jury investigations, which require mandatory closure, R.C.M. 405(h)(3) places the decision to open or close

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231. An argument could be made that an Article 32 investigation, because it is an military proceeding, lends itself to a lesser form of First Amendment scrutiny to support closure. *See* Parker v. Levy, 417 U.S. 733 (1974) ("[W]hile military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."). This argument goes against the rationale of *ABC, Inc*. Another problem with the argument is that closure is not "within the military" as it applies to civilian media and to the public.

232. In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979), the Supreme Court listed the four factors as: (1) prospective witnesses would hesitate to come forward knowing that those against whom they testify would be aware of the testimony, (2) grand jury witnesses would be less likely to testify fully and frankly because they would be open to retribution or inducement, (3) targets would be more likely to flee or try to unlawfully influence grand juries, and (4) targets investigated and exonerated would be subjected to ridicule.

233. United States v. R. Enter., 498 U.S. 292 (1991).

234. *Id.*

235. MCM, *supra* note 24, R.C.M. 405(a).

236. *Id.* R.C.M. 405(f)(5).

237. *Id.* R.C.M. 405(f)(1), (3).

an Article 32 to the discretion of the commander who directed the investigation or the investigating officer.[238] Finally, there are no comparable statutory limitations on disclosure of Article 32 information as there are for federal grand jury material.[239]

In *Press-Enterprise II* and *El Vocero de Puerto Rico*, the Supreme Court relied on a number of characteristics of preliminary probable cause hearings to find that the experience/logic test was met. These characteristics were: (1) the accused is entitled to a preliminary probable cause hearing held before a neutral magistrate in order for his case to proceed to trial; (2) the accused has the right to counsel, to cross-examine, to present testimony, and, in some instances, to suppress illegally seized evidence at the hearing; (3) if no probable cause is found, the hearing provides the only occasion for the public to observe the criminal justice system; (4) no jury is present at the hearing.[240] Characteristics (2) through (4) are present in Article 32 investigations.

Characteristics distinguishing Article 32 investigations from preliminary probable cause hearings are the following: (1) the Article 32 is an investigation rather than a proceeding with a burden of proof;[241] (2) the investigation is conducted by a neutral investigating officer rather than a magistrate;[242] (3) the investigating officer, not the government, decides what witnesses to call and what evidence to consider;[243] (4) the government is not required to be represented at an Article 32 investigation;[244] (5) the probable cause finding by the investigating officer is not binding on the convening authority;[245] (6) the accused has no right to an Article 32 inves-

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238. *Id.* R.C.M. 405(h)(3). The non-binding discussion states that ordinarily Article 32 hearings should be open.

239. Of course, certain characteristics about an Article 32 make the proceeding more like a grand jury than a preliminary probable cause hearing. For example, both the grand jury and the Article 32 are investigations. A preliminary probable cause hearing is not an investigation but a probable cause proceeding. The burden of proof lies with the government. The government decides what witnesses and evidence to present. In grand juries and Article 32 investigations, the grand jurors and investigating officer, respectively, decide what witnesses to call and what evidence to consider. The government is not required to be represented at an Article 32. *See* MCM, *supra* note 24, R.C.M. 405(d)(3)(A).

240. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*).

241. MCM, *supra* note 24, R.C.M. 405(a).

242. *Id.* R.C.M. 405(d)(1).

243. *Id.* R.C.M. 405(g).

244. *Id.* R.C.M. 405(d)(3)(A).

245. *Id.* R.C.M. 405(a).

tigation unless the offense is referred to a general court-martial.[246] Thus, an offense may be tried by a general court-martial even if the investigating officer does not find probable cause.[247] In spite of these distinctions, an Article 32 investigation is very much like a preliminary probable cause hearing. Pursuant to the rationale in *Press-Enterprise II* and *El Vocero de Puerto Rico*, the media First Amendment right of access should attach to Article 32 investigations.

In *ABC, Inc.*, the special court-martial convening authority (SPCMA) closed the entire Article 32 investigation over the objection of both SMA McKinney and the media. As in *Richmond Newspapers*, *Globe Newspaper Co.*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II*, the interests asserted to justify closure were potentially compelling, but the closure was sweeping and overbroad. The SPCMA closed the entire Article 32 to protect the alleged victims' privacy and to prevent potential court-members from being tainted by extrajudicial influence.[248] The CAAF, citing *Globe Newspaper*, stated that it would allow limited closure if justified by individualized findings in the record.[249] Sweeping closure of the entire Article 32 investigation "employed an ax in the place of a constitutionally required scalpel."[250]

Rule for Courts-Martial 405(h)(3) leaves the decision to close an Article 32 within the discretion of the commander who directed the investigation or the investigating officer. Nothing defines the scope of the discretion and no provision gives the media standing to challenge closure. The language of the rule encourages closures that fail the compelling interest/individualized findings/narrowly tailored means test that *ABC, Inc.* applied to closures of Article 32 investigations when the accused is entitled

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246. *Id.*

247. The staff judge advocate must prepare a pretrial advice before any charge can be tried by general court-martial. *See id.* R.C.M. 406 (Pretrial Advice). A general court martial convening authority must consider the findings and recommendations of the Article 32 investigating officer (IO), however, the IO findings and recommendations are not binding on the decision to refer. *See id.* R.C.M. 601 (Referral).

248. ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997).

249. *Id.* Regarding victim privacy, the CAAF cited factors that should be considered on the record. These factors include age, maturity, desires of the victim, nature of the crime, and the interests of the victim's parents and relatives. The CAAF, relying on *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), recognized that "mortification imposed on victim-witnesses in sex cases . . . is a condition which cannot be eliminated from our judicial system."

250. *Id.*

to a public proceeding.[251] *ABC, Inc.* also stated that when the accused is entitled to a public Article 32 hearing, the media has standing to challenge an Article 32 closure. Article 32 investigations closely resemble the preliminary probable cause hearings that the Supreme Court held were subject to a media right of access that is independent of the accused's Sixth Amendment right to public trial.[252]

The reasoning of both the Supreme Court, in *Press-Enterprise II*, and *El Vocero De Puerto Rico*, and CAAF, in *ABC, Inc.*, make it likely that the media has a First Amendment right of access to Article 32 investigations, even if all the parties agree to closure. Rule for Courts-Martial 405(h)(3) should be amended to incorporate the First Amendment closure test and to provide for media standing to challenge closures. The test for closure and the requirement for media standing are the same for both Article 32 investigations and trials, therefore, R.C.M. 405(h)(3) (access by spectators to Article 32 investigations) and R.C.M. 806 (access to courts-martial proceedings) should provide the same test for closure and, also, for media standing to challenge closures.

IV. Access to Judicial Records, Evidence, and Materials or Information Obtained By Discovery in Criminal Cases

A. Access to Judicial Records Generally

There are two sources of media access to judicial information, records, and proceedings: the First Amendment and common law.[253] What comprises a judicial record is not clear.[254] The Supreme Court has not defined the scope of what qualifies as judicial information, records, and proceedings.[255] Federal circuit courts have held that documents filed

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251. *See* San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). The Air Force court denied a media request to open an Article 32 closed over defense objection without applying the compelling interest/individualized findings/narrowly tailored means test. This closure would be unconstitutional under *ABC, Inc.*, 47 M.J. at 363.

252. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (*Press-Enterprise II*).

253. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) (noting that the media has equal, but not greater, right of access than does the general public). *See also* Lisec, *supra* note 200.

254. Lisec, *supra* note 200, at 579-80 (discussing differing definitions of judicial records in *Black's Law Dictionary* and the Federal Rules for Appellate Procedure).

255. *Nixon*, 435 U.S. at 589.

with or introduced into evidence in a court during a criminal or civil trial or pretrial proceeding qualify.[256] Some courts limit the scope to those documents or evidence that are central to the process of adjudication.[257]

Although frequently litigated together, the common law right to copy and inspect judicial records is in addition to, and independent of, the constitutional right of access to criminal proceedings.[258] *Nixon v. Warner Communications, Inc*. is the only Supreme Court case that specifically addresses the media's right of access to judicial records under the First Amendment and under the common law.[259] In 1998, the Supreme Court declined to revisit the issue.[260]

B. First Amendment Right of Access to Judicial Records

Clearly, the media has a First Amendment right to attend and observe criminal proceedings, and to publish information observed in open trial and pretrial proceedings, or contained in court records open to the public.[261] Less clear, however, is whether the First Amendment gives the press any right of access to judicial records, exhibits, or other evidence and information that become part of the record of trial in a criminal case.

In *Nixon v. Warner Communications, Inc.*, the media asserted a right of access under both the First Amendment and the common law, to copy

256. *See* Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 906 (D.C. Cir. 1996).

257. *See* Smith v. United States Dist. Ct. for Southern Dist., 956 F.2d 647 (7th Cir. 1992) (holding that judicial records include documents not admitted into evidence but explicitly relied upon by judge ruling from the bench refusing to grant a delay).

258. *Nixon*, 435 U.S. at 597 (recognizing that the media has a right of access to judicial records under the First Amendment, and, separately, under the common law).

259. *Id.*

260. The Tenth Circuit approved the trial court's denial of access to documents filed in the Timothy McVeigh trial. *See* United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997). The media petitioned for certiorari on the issue of whether the First Amendment right of access extends to documents filed in connection with criminal proceedings. The Supreme Court denied certioriari in *Dallas Morning News v. United States*, 552 U.S. 1142 (1998). Stephen Jones, Timothy McVeigh's defense counsel has written an excellent synopsis of the media issues that arose during the McVeigh case. *See* Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53 (1998).

261. Cox Broad. Co. v. Cohen, 420 U.S. 469 (1975) (holding that the First Amendment prevents the government from enjoining the media from publishing the name of a rape victim where the information was in a court record that was accessible to the public).

audiotapes played into evidence during a criminal trial.[262] The media attended the hearing where the tapes were played, listened to the tapes in open court, and was given transcripts of the tapes' contents.[263] The media argued that it had a First Amendment right of access to copy and publish exhibits and materials displayed in open court.[264] The Supreme Court rejected the media's argument.

The majority prefaced its decision by recognizing that both the public and the media have a First Amendment right to attend, see, and hear what transpires in a courtroom; however, the media news-gathering function does not give it a superior right of access than the right of access available to the general public.[265] In this case, the media was provided transcripts of the audiotapes so there was no issue of the government trying to prevent information from reaching the public. Physical copies of the audiotapes were never made available to the public for copying. *Nixon* held that the First Amendment requires that the media be allowed to see and hear what transpires in court and to freely publish its observations. The First Amendment does not require that the government allow the media to inspect and copy physical evidence or other judicial records to which the public has never had access.[266]

Nixon was decided prior to the *Richmond Newspapers*/*Press-Enterprise* line of cases that recognized a media First Amendment right of access to trials and other criminal proceedings that pass the experience/logic test.[267] No Supreme Court case has addressed what impact, if any, the *Richmond Newspapers*/*Press-Enterprise* line of cases has on the *Nixon* holding the First Amendment requires that the media be able to see and hear what transpires in court but does not require the government to allow the media access to inspect and copy physical evidence, exhibits, or judicial records that have not been made available to the public in a criminal

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262. *Nixon*, 435 U.S. at 591-93.

263. *Id.*

264. The media relied on the rationale of the Supreme Court in *Cox Broadcasting Co. v. Cohen. See* 420 U.S. at 469.

265. *Nixon*, 435 U.S. at 608, 609.

266. *Id.* at 609.

267. A proceeding passes the experience prong if there has been a history of openness or public access to the type of proceeding at issue. A proceeding passes the logic prong if public access to the type of proceeding logically plays a particularly significant role in the functioning of the judicial process and the government as a whole. *See supra* Section III.

trial.[268] As a result, federal and state courts do not apply consistent scrutiny to cases where the media argues it has a First Amendment right of access to judicial records, exhibits, and evidence filed in criminal cases.

A majority of the federal circuits, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits, have extended *Richmond Newspapers*/*Press-Enterprise* to find that the First Amendment right of access to criminal proceedings includes a right of access to certain documents submitted in connection with the proceeding if access to the documents passes the experience/logic test.[269] The Tenth Circuit has avoided the issue of whether there is a First Amendment

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268. In 1998, the Supreme Court denied certiorari to decide whether the media has a First Amendment right of access to documents filed with a court in a connection with criminal proceedings. *See* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (finding that *Nixon* was the only Supreme Court decision addressing access to court files and that *Nixon* did not decide if there was a First Amendment right to court documents), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). For an excellent analysis of why the *Richmond Newspapers/Press-Enterprise* line of cases did not extend the media First Amendment right of access to court records and documents, see *Applications of NBC*, 828 F.2d 340, 348-52 (6th Cir. 1987) (Ryan, J., dissenting).

269. *See* Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (records submitted in connection with criminal proceedings); *In re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) (bail hearings); United States v. Haller, 837 F.2d 84 (2d Cir. 1988) (plea agreements); *In re* New York Times Co., 828 F.2d 110 (2d Cir. 1987), *cert. denied*, Esposito v. New York Times Co., 485 U.S. 977 (1988) (suppression motions and exhibits); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); United States v. Smith, 787 F.2d 111, 116 (3d Cir. 1986) (transcript of sidebar conference); United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (bills of particular); *In re* Washington Post Co., 807 F.2d 383(4th Cir. 1986) (plea agreements); Applications of NBC, 828 F.2d 340 (6th Cir. 1987) (documents in proceeding to disqualify judge); United States v. Ladd (*In re* Associated Press),162 F.3d 503 (7th Cir. 1998) (sealed records filed in a criminal trial); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988)(documents filed to support search warrant); Oregonian Publ'g Co. v. United States Dist. Court, 920 F.2d 1462 (9th Cir. 1990) (plea agreements); Associated Press v. United United States Dist. Court, 705 F.2d 1143 (9th Cir. 1983) (documents filed in pretrial proceedings); United States. v. El-Sayegh, 131 F.3d 158 (D.C. Cir. 1997) (plea agreements); Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (plea agreements). In *In re Gannett News Service*, the Fifth Circuit held that there is no First Amendment right to motions in limine and exhibits attached thereto because these documents filed with the court are not evidence. The Fifth Circuit implied that there is a First Amendment right of access to the same information once it is introduces as evidence at trial. *In re* Gannett News Serv., 772 F.2d 113 (5th Cir. 1985). The District of Columbia Circuit and Seventh Circuit rulings illustrate the confusion in this area. *Compare Robinson*, 935 F.2d 282 (citing *Haller*, *In re Washington Post Co.*, and *Oregonian Publ'g Co.* to find a media First Amendment right of access to plea agreements because they pass the experience/logic test) *with El-Sayegh*, 131 F.3d 158 (recognizing a media First Amendment right of access to "aspects

right of access to judicial records filed in criminal proceedings by assuming, without deciding, that First Amendment strict scrutiny applies to access cases involving such documents.[270] The practical result is that the Tenth Circuit conducts the same compelling interest/individualized findings/narrowly tailored means test required by the majority of circuits that expressly recognize a First Amendment right of access to documents in criminal proceedings. The Eleventh Circuit has not expressly extended the First Amendment right of access to judicial records.[271] Some state courts have found a media First Amendment right of access to documents filed in connection with criminal proceedings; others recognize only a common

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269. (continued) of court proceedings, including documents" if they pass the logic/experience test). The court in *El-Sayegh* went on to find no First Amendment right of access to an unexecuted plea agreement filed as an exhibit to a motion to seal because the experience test is failed. There was no history of access to documents accompanying a criminal procedure until *Robinson* created it in 1991. The Seventh Circuit held that the First Amendment gives the media a presumption that there is a right of access to criminal proceedings and documents meeting the experience/logic test. The Seventh Circuit then stated that the First Amendment presumption is rebuttable when necessary to "preserve higher values" and when denial of access is narrowly tailored. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998). *See also* State v. Archuleta, 857 P.2d 234 (Utah 1993) (documents filed in relation to criminal preliminary hearing). *See generally* Tammy Hinshaw, Annotation, *Right of Access to Federal District Court Guilty Plea Proceeding or Records Pertaining to Entry or Acceptance of Guilty Plea in Criminal Prosecution*, 118 A.L.R. FED. 621 (1994).

270. United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (acknowledging other Circuit cases recognizing a First Amendment right of access to documents related to court proceeding via an extension of *Press-Enterprise* rationale, yet, also acknowledging that *Nixon* did not decide definitively whether there is or is not a First Amendment right of access to such documents), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). *But see* Lamphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994) (finding no First Amendment right of access to criminal justice records). Additional cases hold that there is no First Amendment right of access. *See, e.g.*, *McVeigh*, 119 F.3d at 813 (evidence actually ruled inadmissible); United States v. El-Sayegh, 131 F.3d 158 (D.C. Cir. 1997) (unexecuted plea agreement); United States v. Corbitt, 879 F.2d 224, 229-30 (7th Cir. 1989) (presentence report); Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989) (pre-indictment search warrant affidavits); People v. Atkins, 509 N.W.2d 894 (Mich. Ct. App. 1993) (psychiatrist competency report on accused).

271. *See* United States v. Kooistra, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986) ("The denial of access may be governed by the somewhat less protected common law right to inspect and copy court records."); United States v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985) (no First Amendment right of access to audiotape evidence); Belo Broad. Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981) (no First Amendment right of physical access to trial exhibits). The Eleventh Circuit adopted as precedent all of the Fifth Circuit opinions prior to October 1981. *See* Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

law right of access to judicial records and do not apply First Amendment strict scrutiny at all.[272]

Jurisdictions employing strict scrutiny avoid applying it in some cases by finding that certain information fails the experience/logic test and, therefore, is not a judicial record subject to First Amendment access[273] or by excluding physical evidence, such as videotapes, audiotapes, clothing, or weapons from the definition of judicial record.[274]

When courts apply First Amendment strict scrutiny to judicial records, the sealing of records or other denial of access must be justified by the compelling interest/individualized findings/narrowly tailored means test.[275] The same interests normally asserted to support closure motions are asserted to support sealing of records.[276] The media has standing to challenge sealing or other denial of access.[277]

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272. *Compare* People v. Burton, 189 A.D.2d 532 (N.Y. 1993) (finding First Amendment right of access for documents submitted in conjunction with a motion to be heard in open court); *In re* Times-World Co., 488 S.E.2d 677 (Va. 1997) (finding First Amendment right to documents submitted into evidence during competency hearing) *with* KNSD Channels 7/39 v. Superior Court, 74 Cal. Rptr. 2d 595 (Cal. Ct. App. 1998) (finding public right of access to judicial records by virtue of common law not First Amendment).

273. *See* United States v. Gonzales, 150 F.3d 1246 (10th Cir. 1998) (finding no First Amendment right of access to court-sealed fee, cost, and expense applications by defense counsel for assistance under the Criminal Justice Act, 18 U.S.C. § 3006A because the records are administrative documents, not "judicial records," filed with the court and are not germane to the adjudication process); *see also* the following cases finding no First Amendment right of access: McVeigh, 119 F.3d at 813 (evidence actually ruled inadmissible); *El-Sayegh*, 131 F.3d at 158 (unexecuted plea agreement); *Corbitt*, 879 F.2d at 229-30 (presentence report); *Baltimore Sun Co. v. Goetz*, 886 F.2d at 64-65 (pre-indictment search warrant affidavits); *Atkins*, 509 N.W.2d at 894 (psychiatrist competency report on accused).

274. *See* Sideri v. Office of Dist. Atty., 243 A.D.2d 423 (N.Y. App. Div. 1997), *leave to appeal denied*, 692 N.E. 2d 130 (N.Y. 1998) (holding that clothing and weapons are not judicial records); United States v. McDougal, 103 F.3d 651, 656 (8th Cir. 1996) (holding that a videotape itself is not a judicial record); *but see* KNSD Channels 7/39 v. Superior Court of San Diego County, 163 Cal. App. 4th 1200 (Cal. Ct. App. 4th 1998) (holding that, under common law, courts must allow media access audiotapes introduced in evidence unless significant risk of impairment to integrity of evidence).

275. *See* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (per curiam), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998); *see also* cases discussed *supra* note 269.

276. Interests typically cited to preclude media access to information or proceedings in criminal cases include: (1) preventing prejudicial publicity that threatens an accused's Sixth Amendment right to a fair trial by an impartial jury; (2) protecting testifying witnesses from trauma, embarrassment, or humiliation; (3) protecting trial participant privacy; (4) protecting trial participant safety; (5) preventing disclosure of government information

What, if any, First Amendment right of access exists for records filed with the court but not admitted into evidence is unclear.[278] Recent decisions have found no First Amendment right of access to discovered but not admitted evidence[279] and suppressed evidence.[280] The circuits have inconsistent holdings as to whether there is a First Amendment right of access to search warrant affidavits.[281]

In summary, the vast majority of federal circuits have extended *Richmond Newspapers*/*Press Enterprise* to hold that the First Amendment right of access to criminal trials includes a right of access to at least some documents filed in connection with criminal trials. The case law is especially strong with regard to information introduced into evidence and to executed guilty plea agreements. Courts are less likely to recognize a First Amendment right of access to evidence actually suppressed and to judicial records not relevant to the adjudication of guilt. There is no clear trend of the courts with respect to a First Amendment right of access to pretrial motions and accompanying exhibits filed with the court. Some jurisdictions routinely allow the media access to all documents and exhibits filed with the

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276. (continued) that threatens national security, or is protected by government privilege; (6) preserving the confidentiality of law enforcement information or the identity of undercover officers or informants; (7) protecting trade secrets or other confidential commercial information; and (8)concealing the identity of juveniles. *See generally* Dan Paul & Richard J. Ovelmen, *Access*, 540 PLI/PAT 157 (1998).

277. *See* United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998); *cf. In re* Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983) (holding that it is harmless error for a trial court to deny media standing to challenge denial of access where merits of media claim considered on appeal); United States v. Preate, 91 F.3d 10 (3d Cir. 1996).

278. *See* Michael A. DiSabatino, *Right of Press, in Criminal Proceeding, to have Access to Exhibits, Transcripts, Testimony, and Communications not Admitted in Evidence or Made Part of Public Record*, 39 A.L.R. FED. 871 (Supp. 1998).

279. *Id.*

280. *McVeigh*, 119 F.3d at 813-14 (holding that the First Amendment right of access does not extend to suppressed evidence).

281. *See In re* 2 Sealed Search Warrants, 710 A.2d 202 (Del. Super. Ct. 1997) (citing cases from the Fourth and Ninth Circuits finding no First Amendment right of access during investigative stage and an Eighth Circuit case holding there is a First Amendment right of access); Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) (finding no First Amendment right of access prior to indictment); *In re* Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp., 971 F. Supp. 251 (W.D. Tex. 1997) (finding no First Amendment right during investigative stage).Even where there is a First Amendment right of access, the government's interest in protecting its investigation can outweigh the media right of access. *See In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988).

courts unless they are under seal.[282] Other courts hold that motions in limine and exhibits attached thereto fail the experience/logic test because public dissemination of these documents prior to trial chills an accused's ability to raise pretrial motions.[283]

C. Common Law Right of Access to Judicial Records

Nixon v. Warner Communications, Inc., recognized a common law right of the media to inspect and copy public records and documents, including judicial records.[284] This right is independent of, and in addition to, any First Amendment right of access to judicial records.[285] The common law right of access to inspect and copy judicial records receives far less protection from the courts than does the First Amendment right of access to criminal proceedings.[286] Denials of this common law right of access to inspect and copy judicial records do not receive strict scrutiny analysis. The decision to apply the common law right rests with the discretion of the trial court.[287] A trial court may deny the common law access if it determines that court files will be used for improper purposes. *Nixon* cited the following examples of improper purposes: using divorce records to promote private spite or public scandal, using court files to publish libelous information, or using court files to gain business information to harm a litigant's competitive standing.[288] The trial court balances the presumed public interest in access against the interests asserted by other parties. The balance struck by the trial court is reviewed for abuse of discretion.[289]

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282. Court files were open during the William Kennedy Smith case. Prosecutors filed a motion in limine to introduce evidence of similar sexual misconduct by Smith involving three women other than the victim. The evidence was ruled inadmissible and was not introduced at trial. Because the motion in limine was not filed under seal, the media had access to the information and widely publicized it. In such cases, prosecutors could file motions in limine hoping that media publication would create public pressure for the court to admit the evidence or to make potential jurors aware of the evidence. *See* Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 551 n.310 (1993).

283. *See McVeigh*, 119 F.3d at 813; *In re* Gannett News Serv., Inc. 772 F.2d 113 (5th Cir. 1985); United States v. Martin, 38 F. Supp. 2d 698 (C.D. Ill 1999).

284. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

285. *Id.*

286. When the First Amendment right of access applies, courts must apply the compelling interest/individualized findings/narrowly tailored means test to deny access.

287. *Nixon*, 435 U.S. at 599.

288. *Id.* at 598.

289. *Id.* at 599.

Finally, *Nixon* rendered the common law right of access to inspect and copy judicial records ineffective as a remedy in many cases by holding that a statute providing a means and procedures for release of the information, tips the balance in favor of denying access under the common law because the statute provides an alternative means of access.[290] Examples of statutes that tip the balance against the common law right of access are FRCP 6(e) (grand jury secrecy)[291] and FOIA.[292]

Once the media legitimately obtains information disclosed in an open proceeding or in openly filed documents with the court, it can publish the information with impunity.[293] This is true even if the government, inadvertently, or by mistake, allows the media access to the information.[294]

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290. *Id.* at 605 (noting that the Presidential Recordings Act provides an alternative means of accessing the audiotapes at issue and satisfies the common law right of access).

291. FED. R. CRIM. P. 6(e). *See In re* Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998); Doe. No. 4 v. Doe No. 1 (*In re* Grand Jury Subpoena), 103 F.3d 234, 237 (2d Cir. 1996).

292. 5 U.S.C.S. § 552 (LEXIS 2000). *See* Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 903 (D.C. Cir. 1996) (discussing FOIA, the court recognized that statutory alternative means of access tips the scales against common law disclosure. The court declined to address whether statutory alternative precludes assertion of common law right of access).

293. Some courts have ordered information sealed after it has been publicly filed with the court by mistake or otherwise. *See* United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998). In *Gangi*, the government mistakenly filed publicly with the with the court a prosecution memorandum discussing ongoing investigations and identities of confidential witnesses. The court, over media objection, granted government's request to redact information in the prosecution memorandum pertaining to ongoing investigations and confidential witness identity. The court provided the defense the redacted prosecution memorandum and issued a protective order precluding the defense from further disclosing it. The media objected arguing that since the prosecution memorandum had been publicly filed and widely distributed, it should have a right to view and publish the redacted memorandum. Although not addressed in *Gangi*, if the media had legally acquired the prosecuprosecution memorandum prior to the sealing, it would have been free to print the information. *See supra* Section II. *See also* Howard Publications, Inc. v. Lake Mich. Charters, 649 N.E.2d 129 (Ind. Ct. App. 1995).

294. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (holding that courts can impose protective orders preventing parties from disseminating information gained through discovery but may not prohibit parties from disseminating the same information if it is obtained from another source). *Seattle Times* dealt with protective orders upon parties to litigation. It did not address protective orders to non-parties regarding publication of information gained through discovery. At least one civil case has interpreted *Seattle Times* to allow a court to enjoin a non-party newspaper from publishing information labeled "privileged documents for in-camera review" examined by a reporter while inspecting the court's case file. *Howard Publications Inc.*, 649 N.E.2d at 129) (allowing a protective order to be

D. Access to Information Obtained Through Discovery

The media does not have a First Amendment right of access to discovered information that has not been filed or otherwise introduced into a trial.[295] In *Seattle Times*, a civil case, the Supreme Court opined that discovery, pretrial depositions, and pretrial interrogatories are not public components of a civil trial.[296] The purpose of discovery is solely to prepare for trial.[297] Neither a litigant, nor anyone else, has a First Amendment right of access to information made available solely by discovery rules.[298] *Seattle Times*, recognizing that liberal discovery rules may result in abuses such as delay, expense, and damage to the privacy of litigants and third parties, held that civil courts have the power to restrict participants in a case from further disseminating information gained through discovery.[299]

Although the Supreme Court has never expressly held *Seattle Times* applicable to criminal discovery, it has so stated in dicta.[300] Lower courts addressing the issue have consistently held that *Seattle Times* applies to discovered information in criminal cases.[301] Thus, courts may impose protective orders prohibiting the dissemination of information gained through

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294. (continued) entered after third-party newspaper gains access to discovery information intended to be privileged).

295. *Seattle Times Co.*, 467 U.S. at 20.

296. *Id.* at 33. The case cites *Gannett Co. v. DePasquale*, 443 U.S. 368, 369 (1979), to support its conclusion that pretrial depositions and interrogatories were not traditionally open to the public at common law. *Gannett*, decided seven years prior to *Press-Enterprise II*, refused to find a media first amendment right of access to pretrial proceedings. *Press-Enterprise II* did not expressly overrule *Gannett*, even though the holdings are clearly inconsistent. *See* Kulish, *supra* note 139, at 1-9

297. *Seattle Times Co.*, 467 U.S. at 32-34 (recognizing that, although discovery rules vary among jurisdictions based on legislative determination, the purpose of discovery is to prepare for trial).

298. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (recognizing in-camera review by trial court as an appropriate means to determine if the public interest in preventing disclosure of sensitive information is outweighed by an accused's right to discover exculpatory evidence).

299. *Seattle Times Co.*, 467 U.S. at 32.

300. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1052 (1991) ("[The Supreme Court] ha[s] upheld restrictions upon the release of information gained only by virtue of the trial court's discovery processes . . . *Seattle Times* would prohibit release of discovery information by the attorney as well as the client.").

301. *See* United States v. Gonzalez, 150 F.3d 1246, 1260 (10th Cir. 1998) (holding discovery proceedings to be different from other proceedings where courts recognize a First Amendment right of access); United States v. Ladd (*In re* Associated Press), 162 F.3d 503 (7th Cir. 1998) (finding discovered but not admitted documents not within the scope of the media right of access); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986)

discovery without resorting to the compelling interest/individualized findings/narrowly tailored means test and without providing the media notice and an opportunity to be heard.[302]

It bears remembering that once the media legitimately obtains information, it can publish the information with impunity.[303] This is true even if the information is released inadvertently, or by mistake.[304]

E. Military Cases

1. First Amendment Right of Access

Only one reported military case has addressed the First Amendment right of access to judicial records in courts-martial trials. In *United States v. Scott*, the ACCA, sua sponte, set aside a trial judge's order sealing a stipulation of fact after it was admitted into evidence in open court.[305] The stipulation described the details of multiple sexual acts between the accused and the fifteen-year-old victim and the details of an attempted murder of another soldier by the accused.[306] The trial judge justified the seal based on privacy interests of persons referenced in the stipulation, but did not make any specific findings on the record.[307] No party requested the seal. No Article 39(a) session was held to address the sealing.[308]

The ACCA, citing *Nixon*, stated that the Supreme Court has recognized a qualified First Amendment right of access to "materials entered into evidence in federal criminal trials."[309] The ACCA declined to

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301. (continued) (holding that discovery is not public process or public record and that discovery materials are not judicial records); United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998). *See generally* DiSabatino, *supra* note 278, at 871.

302. *See Gangi*, 1998 U.S. Dist. LEXIS 6308, at *2 (declining to require First Amendment scrutiny to issue a protective order prohibiting dissemination of discovery.).

303. *See* discussion *supra* note 293.

304. *Id.*

305. United States v. Scott, 48 M.J. 663 (Army Ct. Crim. App. 1998) (setting aside the seal but upholding the conviction finding no prejudice to the accused).

306. *Id.* The accused plead guilty to carnal knowledge with the fifteen-year-old and to attempted murder of another soldier.

307. *Id.* The tenor of the decision indicates that the trial judge was trying to protect the privacy interest of the fifteen-year-old victim.

308. *Id.* at 664.

309. *Nixon* did not find a First Amendment right of access to materials entered into evidence. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Federal cases holding that there is a First Amendment right of access to documents in criminal trials have

expressly decide whether the First Amendment right of access attaches to records of courts-martial trials, stating only that the First Amendment right of access that applies to information in evidence in federal criminal trials *may* apply equally to exhibits presented during a public court-martial trial.[310]

The ACCA went on to state:

> [It] need not decide in this case whether or to what extent the public has a qualified right of access to the record of trial. Our concern is only that the record and exhibits appended thereto are not improperly burdened by overly restrictive protective orders issued by a trial judge. Thus, we focus on the procedures a military judge must use before issuing a protective order concerning a prosecution exhibit admitted during a public hearing.[311]

The ACCA then went on to require that military judges conduct the First Amendment compelling interest/individualized findings/narrowly tailored means test before sealing an exhibit presented in open court.

2. Common Law Access

No reported military case addresses the common law right of access to judicial records in courts-martial. Both federal courts and courts-martial are exempt from FOIA.[312] Unlike records of trial in federal court, which

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309. (continued) relied on the *Richmond Newspapers*/*Press-Enterprise* line of cases Those arguing against such a First Amendment right of access cite *Nixon. Nixon* found no First Amendment right to copy audio-tape played in open court when there was no attempt by the government to inhibit the flow of information and the media was provided with a transcript of the audio-tape. *See also* United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (finding that *Nixon* did not recognize First Amendment right of access to court files), *cert. denied*, Dallas Morning News v. United States, 552 U.S. 1142 (1998). *See also* Applications of NBC, 828 F.2d 340, 346-52 (6th Cir. 1987) (Ryan, J., dissenting) (citing *Nixon* to argue that the Supreme Court does not recognize a First Amendment right of access to court documents and records and that any right of access to such documents and records arises only from the common law); Jones & Hillerman, *supra* note 260, at 53, 77 (discussing the fact that defense counsel for Timothy McVeigh cited *Nixon* in opposing media motion for access to sealed documents).

310. *Scott*, 48 M.J. at 664.

311. *Id.* at 664 n.3.

312. Congress exempted "the Courts of the United States" and courts-martial from the definition of "agency" for purposes of FOIA and PA. *See* 5 U.S.C.S. § 551(1)(B), (F) (LEXIS 2000). *See also* Smith v. United States Dist. Ct. for Southern Dist., 956 F.2d 647 (7th Cir. 1992) (holding that FOIA does not apply to federal courts).

are public documents maintained by the office of the Clerk of Court after the trial is over,[313] courts-martial records of trial are maintained after trial by the armed services as federal agencies.[314] Thus, after court-martial trials are completed, FOIA and the PA govern release of the records.[315] Nothing defines when the "end" of a court-martial occurs to subject courts-martial records to FOIA. It is also not clear at what point records normally subject to FOIA because they are maintained by an armed service become "judicial records" of a court-martial that are exempt from FOIA.

If there is a common law right of access to courts-martial records, FOIA,[316] as implemented by the Department of the Defense (DOD), provides an alternative means to access records of courts-martial.[317] This alternative means of public access should tip the balance in favor of denying access under the common law, even though access may not be contemporaneous with the trial.[318]

3. Discovery

Rule for Courts-Martial 701(g) provides for regulation of discovery.[319] The rule authorizes the military judge to make time, place, or manner restrictions on discovery and provides for in-camera inspection of

313. *See* Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979) (holding that transcript of a federal trial in the possession of the Department of Justice remained a court document not subject to FOIA).

314. *See* 5 U.S.C.S. § 552(a)(e)(4); The Privacy Act System Notice Requirement Applies to Court-Martial Files, Op. Defense Privacy Board, No. 32 *available at* <http://www.defenselink.mil/privacy/ opinions/op0032.html>.

315. 5 U.S.C.S. § 552(a)(e)(4).

316. *Id.* § 552.

317. U.S. DEP'T OF DEFENSE, DIR. 5400.7, DEP'T OF DEFENSE FREEDOM OF INFORMATION ACT PROGRAM (13 May 1988) (DOD regulation implementing FOIA); DEP'T OF DEFENSE FREEDOM OF INFORMATION PROGRAM (4 Sept. 1998) (includes 1996 amendments to FOIA); AR 25-55, *supra* note 24 (Army regulation implementing FOIA). *See also* United States v. Scott, 48 M.J. 663 (1998).

318. Nixon v. Warner Communications, Inc., 435 U.S. 589, 606 (1978).

319. MCM, *supra* note 24, R.C.M. 701(g). The regulation of discovery section reads as follows:

> (1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.
>
> (2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be

discovery materials.[320] Regulating dissemination of discovery is authorized by R.C.M. 701(g) section 1 as a time, place, or manner restriction.[321] Rule for Courts-Martial 701 provides adequate authority for a military judge to regulate discovery. Neither the Supreme Court nor the CAAF has recognized a First Amendment right of access to discovery. Thus, military judges are free to regulate discovery without employing strict First Amendment scrutiny or providing the media notice and an opportunity to be heard. There have been no reported military cases involving media challenges to protective orders prohibiting or regulating dissemination of discovery or to in-camera reviews of discovery by the military judge.[322]

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319. (continued)

> denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination by the military judge.
>
> (3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:
>
> (A) Order the party to permit discovery;
>
> (B) Grant a continuance,
>
> (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
>
> (D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

Id.

320. *Id.*

321. *Id.* app. 21, R.C.M. 701(g) analysis.

322. There are many reported cases where the accused has challenged a military judge's in-camera review of discovery or denial of discovery. None of these challenges are based on First Amendment access or Sixth Amendment public trial grounds. *See id. See also* United States v. Morris, 52 M.J. 193 (1999) (denying discovery of victim's medical, psychological and counseling records); United States. v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App. 1999) (chastising the military judge for not conducting an in-camera review before defense request for records affecting victim's credibility); United States v. Briggs, 48 M.J. 143, 145 (1998) (addressing challenge by accused that trial counsel denied him exculpatory and material evidence in victim's medical records). The CAAF stated in dicta:

Two relevant military cases defining the scope of protective orders for discovery are *Gray v. Mahoney*[323] and *Carlson v. Smith.*[324] In *Gray*, after a trial in which the accused was acquitted, the government tried to prevent the accused from making copies of a videotape obtained through discovery. The videotape was made by one of the accused showing several of the victims engaging in sex acts with him. The government gave the tape to the defense as discovery, without restriction. The CAAF held that any restrictions on discovery must be imposed before the discovered information is made openly available. Once the government makes discovery openly available and does not seek regulation before or during the trial, it has waived any ability to regulate what has been discovered.[325] The case was not clear on whether the government, prior to the end of a trial, can seek a protective order regarding discovery it has publicly released or whether the public release precludes a curative protective order under all circumstances.[326]

In 1995, one year after *Gray* was decided, the CAAF in a summary disposition, opined that a trial judge had authority, before and during a court-martial, to withdraw documents previously given to defense counsel and to impose a protective order on documents previously released by the government with no restriction. In *Carlson v. Smith*, the CAAF considered

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322. (continued)

> The preferred practice is for military judges to inspect medical records in camera to determine whether any exculpatory evidence was contained in the file prior to any government or defense access . . . The proper procedure is for trial counsel to call the records custodian as an authenticating witness. This witness need only deliver an accurate and sealed copy of the records to the military judge for in camera review. Once reviewed, the military judge makes a ruling either allowing access to both sides, or denying access and resealing the records as an exhibit for appellate review.

Id.; United States v. Charles, 40 M.J. 414 (1994) (denying discovery of internal investigation reports involving civilian police officer witnesses after in-camera review); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (denying discovery of prosecutor's interview notes after in-camera review); United States v. Watkins, 32 M.J. 1054 (Army Ct. Crim. App. 1991) (upholding non-disclosure of informant).

323. 39 M.J. 299 (C.M.A. 1994).

324. 43 M.J. 402 (1995) (summary disposition).

325. *Gray*, 39 U.S. at 305. Judge Gierke concurred in the result but disagreed with the majority view that a protective order must be issued before the release of evidence to be enforceable. *Id.* at 306.

326. *Compare Gray*, 39 U.S. at 299, *with* United States v. Gangi, 1998 U.S. Dist. LEXIS 6308 (S.D.N.Y. May 1, 1998) *and* discussion *supra* note 293.

a request by two non-parties for the CAAF to issue a writ of mandamus ordering the trial court to withdraw a subpoena duces tecum for allegedly privileged information and to withdraw or protect confidential Equal Employment Opportunity (EEO) documents that had already been disclosed to the defense in a special court-martial.[327] The CAAF ordered the military judge to examine the subpoenaed documents and conduct an in-camera hearing to include the accused, counsel for the government and defense, and the non-party petitioners and their counsel.[328] The military judge was ordered to allow all participants to present evidence, argument, and legal authority regarding the propriety and legality of disclosing the documents.[329] The purpose of the hearing was to determine whether any subpoenaed documents were privileged or should not be disclosed for some other reason and whether any EEO documents previously released to the defense should be withdrawn or otherwise protected from further dissemination.[330]

In *Gray*, the government requested the post trial withdrawal order to protect privacy interests of victims of sexual misconduct. In *Carlson*, non-parties who had no control over the government's initial unrestricted release of information, requested withdrawal and protection. The ability to subsequently request a protective order for information released for discovery without restriction by the government, may depend on whether it is the government or another interested person who requests the protection. The government has power to control the release of information in its possession. In *Carlson*, the other parties in interest do not.

Gray should be limited to its facts. Arguably, it would be unconstitutional for the military courts to prevent an accused who makes a videotape prior to the litigation from disseminating it. *Seattle Times* held that courts may regulate dissemination of information gained through discovery but not if the same information was gained outside of the litigation process.[331] The accused in *Gray* technically acquired the videotape during discovery after it was seized from him. In light of the fact that this accused made the tape prior to the litigation, he gained the information independent of the litigation process. In any event, the military has open discovery rules. In

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327. Carlson v. Smith, 43 M.J. 402 (1995) (summary disposition). *United States v. Reeves* was the special court-martial for which the information was sought.

328. *Carlson*, 43 M.J. at 402.

329. Any documents not disclosed after the hearing were to be forwarded with the record as a sealed appellate exhibit.

330. *Carlson*, 43 M.J. at 402.

331. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

many jurisdictions, the prosecution routinely allows the defense to review the file and the investigative report. A requirement on the government to impose restrictions on discovery prior to release or be forever precluded from obtaining a protective order will chill open discovery and encourage tedious discovery litigation. The better approach would be for CAAF to limit *Gray* to its facts and allow the government to request a protective order for discovered information at any time.

4. Conflict Between Access Under FOIA and the First Amendment Right of Access

The media has been aggressive in asserting that it has both a Constitutional and a common law right of access to inspect and copy judicial records filed in federal and state criminal trials.[332] As military trials continue to attract media attention, these First Amendment and common law challenges from the media are likely to increase.[333] The majority of federal circuits have interpreted the *Richmond Newspapers*/*Press-Enterprise* line of cases to find that the First Amendment right of access to criminal proceedings includes a right of access to, at least some, judicial records filed in criminal trials. The case law in favor of access is particularly strong with regard to information introduced into evidence at trial and executed guilty pleas.

The media will likely be successful in asserting standing to raise First Amendment and common law rights of access to judicial records and documents filed in courts-martial trials.[334] The *Manual for Courts-Martial* provides no procedure for notifying the public or the media of contemplated closures of criminal proceedings or sealing of records. Docketing and motions filing are normally conducted pursuant to local rules of court and are not uniform.[335]

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332. *See* Jones & Hillerman, *supra* note 260.

333. *See supra* text accompanying Introduction.

334. Civilian courts and CAAF have also recognized that the media has a right to notice and opportunity to raise access issues even though they are not parties to the case. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that whenever an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied); ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) (same).

335. This fact is based on the author's experience as an Army trial and defense counsel in Kentucky, Germany, and Hawaii. Docketing procedures that deny the media and the public notice of closed proceedings or in-camera hearings have been held to be unconstitutional. *See* United States v. Valenti, 987 F.2d 708 (11th Cir. 1993).

Assuming the media has been notified of a pending sealing or other denial of access and the military judge properly provided the media standing to challenge the denial of access, there is no express authority in the *Manual for Courts-Martial* for military judges to release trial exhibits, motions, plea agreements, or any other information filed in the trial.[336] The trial counsel, not the military judge, is responsible for preparing and forwarding the record of trial.[337] Military judges also do not have initial denial authority under FOIA. The initial denial authority for records pertaining to courts-martial is the service judge advocate general, or other agency official.[338]

Three conflicts, therefore, arise between the media First Amendment right of access to judicial records and FOIA. First, FOIA does not employ the compelling interest/individualized findings/narrowly tailored means test required to deny access to judicial records when the First Amendment right of access has attached. The FOIA mandates release of agency records unless an exemption or exclusion applies.[339] Exemptions that are typically asserted to deny access in courts-martial records cases are Exemption 5 (deliberative process privilege, attorney-work- product privilege and attorney-client privilege), Exemption 6 (information in personnel, medical, and similar files), and Exemption 7 (records compiled for law enforcement purposes).[340] The FOIA employs criteria for release and balancing tests for each exemption.[341] Second, officials from the armed services, not the

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336. An argument can be made that control of court records is an implied part of the military judge's responsibility as the presiding officer in a court-martial. *See* MCM, *supra* note 24, R.C.M. 801.

337. The trial counsel, under the supervision of the military judge, is responsible for preparation of the record of trial. *See id.* R.C.M. 1103(b)(1)(A).

338. *See* AR 25-55, *supra* note 24, para. 5-200d(14) (designating The Judge Advocate General as the initial denial authority for records relating to courts-martial).

339. An in-depth discussion of releases of records in criminal cases pursuant to FOIA is beyond the scope of this article.

340. *See* 5 U.S.C.S. § 552(b)(5), (6), (7) (LEXIS 2000); AR 25-55, *supra* note 24, para. 3-200, 5, 6, and 7.

341. The Privacy Act generally prohibits disclosure of personal information that is maintained in a system of records (a group of records retrieved by name or personal identifier) to third parties without the consent of the individual to whom the record pertains. 5 U.S.C.S. § 552a(b). One exception to the "no disclosure without consent rule" is when FOIA requires release. *Id.* § 552(b)(2). While FOIA generally mandates release, FOIA Exemption 6 allows withholding of personal information maintained in "personnel, medical, or other similar files." *Id.* § 552(b)(6). Similarly, Exemption 7(c) allows agencies to withhold personal information maintained in law enforcement records. *Id.* § 552(7). Both Exemptions 6 and 7(c) require the government to conduct a balancing test to weigh the public interest in release against the privacy interest in withholding. If the public interest out-

341. (continued) weighs the privacy interest, FOIA require release. *See* United States Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989). The government may not make a discretionary release of information protected by FOIA Exemptions 6 or 7(c) or the Privacy Act. *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 257-303, 342-71 (1998). An interesting issue that is beyond the scope of this article is the extent to which the media's First Amendment right of access to judicial records containing Privacy Act protected information is weighed in Exemption 6 and 7(c) balancing test. Arguably, if the First Amendment right of access attaches, then the balance should be in favor of release. The balance may change depending on the timing of the request for records. The public interest in the information is particularly acute during the trial. The public interest in the Privacy Act information may diminish over time. *See Reporters Committee*, 489 U.S. at 749 (deciding that, under FOIA Exemption 6 and 7(c) analysis, there can still be substantial privacy interests for information that has been available to the general public). This issue is problematic for the government under the current rules because the government may be sued under the Privacy Act for unlawful release of protected information and under Federal Tort Claims Act for releases in violation of a constitutional right to privacy. *See* Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (noting that an Army major general sued under the Privacy Act for improper release of non-judicial punishment taken against him); Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995) (suit against Army under the Federal Tort Claims Act for improper release of investigation records).

In *Cochran*, the Eleventh Circuit upheld the release by the Army of nonjudicial punishment given to Major General Cochran for misconduct involving use of government facilities and funds. The court held that release was required under FOIA Exemption 6 because the public interest in this type of misconduct by a high ranking military officer outweighed the privacy interest. In a footnote, the Eleventh Circuit questioned whether release of the Article 15 was even covered by the Privacy Act. The court stated:

> As an aside, it might be questioned whether current newsworthy information of interest to the community, such as contained in the press release at issue in the present case, even falls within the strictures of the Privacy Act. As the legislative history indicates, the Privacy Act was primarily concerned with the protection of individuals against the release of stale personal information contained in government computer files to other government agencies or private persons . . . The legislative history of the Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people. Furthermore, there is great public interest in insuring the dissemination of current, newsworthy, information by the press, particularly when the information relates to the operations of the government . . . . We do not need to reach this intriguing question in view of our resolution of the present case.

Cochran, 770 F.2d at 959 n.15. Another interesting area where the Army can be sued is the increasing scope of the constitutional right to privacy. For example, the Sixth Circuit recently held that it may be a violation of police officers' constitutional right of privacy for prosecutors to release their personnel files to defense counsel. *See* Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). Thus, the government cannot adopt a "release everything" to the media approach in criminal cases.

military judge, control access decisions. The armed service prosecuting the case, at least from the perspective of the accused, is a party in interest in the trial.[342] Third, release pursuant to FOIA may not be contemporaneous with the trial.[343] Thus, the common law right of access is probably satisfied by the availability of FOIA as an alternate mechanism of release even though release of court-martial records may not take place contemporaneously with the trial.[344]

Although FOIA provides an alternative means for releasing courts-martial records that satisfies the common law right of access, FOIA procedures do not satisfy the First Amendment right of access.[345]

Rule for Courts-Martial 806 (Public Trial) should be amended to place judicial records filed in connection with a court-martial within the control of the military judge during the trial (from referral to authentication); authorize the military judge to decide, during a trial, whether to release or withhold judicial records and evidence filed in connection with a pending court-martial; and provide the media and public notice and an opportunity to be heard prior to sealing or other denial of judicial records filed in a court-martial trial.

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342. Military cases often involve challenges to armed service policies. For example, former First Lieutenant Kelly Flynn challenged the military fraternization policies and alleged that the armed forces discriminated between low and high-ranking officers and between men and women when enforcing the policy. *See supra* note 9. Command Sergeant Major (Ret.) Gene McKinney alleged that the military treated senior officers and enlisted personnel differently in sexual misconduct cases. *See supra* note 10. *But see* United States v. Mitchell, 39 M.J. 131 (C.M.A. 1994) (finding The Judge Advocate General or The Assistant Judge Advocate General for Military Law not prosecutors or "aligned with the government"); *See also* Weiss v. United States, 510 U.S. 163 (1994) (stating that The Judge Advocates General do not have an interest in the outcome of an individual court-martial).

343. FOIA allows agencies to have 20 days to respond to FOIA requests and an extra 10 working days upon written notice to the requester (5 U.S.C. § 552(a)(6)(A)(i)). *See also* United States DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW, 40-44 (1998).

344. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 603 (1978) (holding that administrative procedure for process and release of information to the public at some time in the future, tips the balance in favor of denying common law right of access).

345. The scope of the First Amendment right of access to records of completed trials may depend on why access is sought. Many states have enacted laws applying more stringent standards for release for commercial purposes. *See, e.g.*, Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999); United Reporting Publ'g Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998); Lamphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994).

V. Access To Information From Trial Participants: Ethics Rules and Gag Orders

A. Generally

The essence of the media's First Amendment right of access to criminal proceedings and evidence is the right to attend, see, and hear what is presented and to freely publish what it has observed.[346] Neither the public nor the media has a First Amendment right to be free from court restriction on interviewing attorneys or other trial participants about pending cases in litigation.[347]

Attorneys and other trial participants have free speech rights under the First Amendment.[348] This section discusses the extent to which states and courts can regulate trial participants' speech when the speech threatens to prejudice a criminal trial or other adjudicatory proceeding.

Two methods exist to restrain release of extrajudicial information in pending cases by case participants. The first are rules of ethics imposed by jurisdictions on attorneys practicing within the jurisdiction. The second are restraining or "gag" orders imposed by trial courts on some or all court participants. Ethics rules govern extrajudicial speech by attorneys.[349] They are applicable sua sponte to all cases tried within the jurisdiction. Gag orders are optional measures that can be imposed by trial courts to prevent attorneys and other trial participants, to include parties, law enforcement personnel, witnesses, and anyone else connected with the trial, from disclosing information or making extrajudicial statements about a particular case. Both of these methods impact upon the First Amendment free speech rights of the speaker.

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346. United States v. Nixon, 435 U.S. 589, 609 (1978).

347. *Id.*

348. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1071-72 (1991) (holding, generally, that attorneys and other trial participants have First Amendment free speech rights, however, speech may be limited in pending cases to prevent material prejudice to the proceedings).

349. Most ethics rules also require prosecutors to exercise reasonable care to prevent persons assisting or associated with the prosecutor, such as investigators, persons involved with law enforcement, and lawyer support personnel, from making comments that the prosecutor may not make. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.8 (1 May 1992). *See* discussion *infra* note 388.

B. Ethics Rules Limiting Attorney Speech and Disclosure of Information

Almost all jurisdictions have rules of professional responsibility governing trial publicity that are modeled on some version of the American Bar Association (ABA) Model Rules.[350] The ABA rules have different standards of harm that must be met to restrict extrajudicial speech by attorneys. The first ABA rule, Disciplinary Rule 7-107, adopted in 1968, restricted attorney speech based on a reasonable likelihood of prejudice.[351] The second ABA rule, adopted in 1978, allowed restriction only if there was a clear and present danger of prejudice.[352] Finally, ABA Model Rule of Professional Conduct 3.6, originally drafted in the 1980s, selected an intermediate approach and allowed restriction based on a substantial likelihood of material prejudice.[353]

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350. *See Gentile*, 501 U.S. at 1067-69, nn.1, 2 (listing states with ethics rules regarding trial publicity that are modeled on the American Bar Association (ABA) Model Rules or Disciplinary Rules); *see also* Barry Tarlow, *Latest Battles Over Lawyers' Right to Speak Out*, THE CHAMPION (July 1998) (discussing federal district courts local rules governing attorney speech in pending criminal cases); Katrina M. Kelly, *The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s*, 16 N. ILL. U. L. REV. 483, 493-45 (1996) (discussing state ethics rules). For a thorough review of the development of ABA trial publicity rules. *See* Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 502-24 (1993).

351. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1968) (restricting extrajudicial speech if there was a reasonable likelihood of prejudice). *See also Gentile*, 501 U.S. at 1068 n.2 (citing 11 states having adopted the reasonable likelihood of prejudice standard as of 1991); Kelly, *supra* note 350, at 493 (citing seven states having the reasonable likelihood of prejudice standard as of 1996); Catherine Cupp Theisen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837 (1996) (describing historical development of ABA rules dealing with tribunal publicity).

352. *See Gentile*, 501 U.S. at 1068 n.3 (citing five states and the District of Columbia applying the clear and present danger standard); Kelly, *supra* note 350, at 493 (citing nine states and the District of Columbia with a clear and present danger standard as of 1996). *See also* Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. 1347 (1993) (discussing debate on what First Amendment standard is required to restrict attorney speech).

353. MODEL RULE OF PROFESSIONAL CONDUCT 3.6 (1983). *See also Gentile*, 501 U.S. at 1068 n.1 (citing 31 states applying the substantial likelihood of material prejudice standard as of 1991); Kelly, *supra* note 350 (citing 33 states with a substantial likelihood of material prejudice standard as of 1996).

1. Gentile v. State Bar of Nevada

In 1991, the Supreme Court addressed whether an ethics rule regulating attorney speech under the substantial likelihood of material prejudice standard violates the First Amendment free speech rights of attorneys participating in pending cases.[354] Dominic Gentile, a defense attorney, challenged disciplinary action taken against him by the Nevada State Bar for violating Nevada Supreme Court Rule 177 (Rule 177).[355]

The basis for discipline was Gentile's violation of Rule 177 by holding a press conference shortly after his client, Grady Sanders, was indicted. Sanders was charged with stealing four kilos of cocaine and approximately $300,000 from a safety deposit vault at Western Vault Corporation.[356] Gentile held the press conference to publicize Sanders's side of the case. His purposes were to counter publicity adverse to his client that Gentile believed originated from the police and prosecutors and to prevent further poisoning of the jury venire.[357] Gentile feared that, unless some prosecution weaknesses were made public, the defense would be unable to get an impartial jury.[358] At the time of the press conference, Gentile was aware of at least seventeen articles publicizing the theft in the major local newspapers as well as numerous television reports about the investigation.[359]

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354. *Gentile*, 501 U.S. at 1030.

355. Rule 177 is based on the ABA Model Rule of Professional Conduct 3.6 that restricts attorney speech when there is a substantial likelihood of material prejudice to an adjudicative proceeding. *See Gentile*, 501 U.S. at 1070 n.4.

356. *Gentile*, 501 U.S. at 1039-40. The drugs and money had been used in undercover operations by the Las Vegas Metropolitan Police Department (Metro). Gentile's client, Sanders, owned Western Vault.

357. The theft occurred approximately one year prior to Mr. Sanders's indictment. Metro police initially reported at a press conference that the police and Western Vault employees were suspects. Two Metro officers, Scholl and Schaub, had free access to the vault during the time of the theft. During the year prior to the indictment, the media reported, among other things, that the police did not consider Scholl and Schaub responsible, that thefts had been reported from other safety deposit boxes in the Vault, that investigative leads pointed to Sanders as the thief, that Sanders's business records suggested he had a business relationship with the targets of the undercover investigation, that the police cleared Scholl and Schaub because they passed lie detector tests given by Ray Slaughter, a man subsequently arrested by the FBI for distributing cocaine to an FBI informant, that Sanders refused to take a lie detector test, and that the FBI believed Metro officers were responsible for the theft. *Id.* at 1039-42.

358. *Id.* at 1042-43.

359. *Id.* at 1042.

Gentile challenged the disciplinary action on two grounds. First, he argued that the First Amendment requires that there be a clear and present danger or imminent threat of material prejudice to an adjudicative proceeding before a state may regulate attorney speech.[360] Gentile cited *Nebraska Press v. Stuart*, the case in which the Supreme Court held that there must be a clear and present danger or imminent threat of material prejudice before a state can regulate media publication during pending trial proceedings.[361]

Second, Gentile argued that even if the substantial likelihood standard is constitutionally permissible, his press conference fell within the "safe harbor provision"[362] of Rule 177 because he was describing the general nature of the defense without elaboration as allowed by the rule.[363] The language of Rule 177 allows attorneys to make statements that fall within this "safe harbor provision" notwithstanding the prohibitions in the rest of

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360. *Id.* at 1051-52.

361. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See supra* Section II.

362. "Safe harbor provision" is the term used by the Supreme Court in *Gentile* to describe that part of ABA Model Rule 3.6 that allows attorneys to make certain enumerated extrajudicial statements even if they are substantially likely to prejudice an adjudicative proceeding. Rule 177(3)(a) allows an attorney to "state without elaboration . . . the general nature of the . . . defense . . . notwithstanding subsections 1 [prohibition against statements when there is substantial likelihood of material prejudice to an adjudicative proceeding] and 2(a-f) [list of statements likely to cause substantial likelihood of material prejudice]." *See Gentile*, 501 U.S. at 1048.

363. *Gentile*, 501 U.S. at app. A. Gentile read a prepared statement and responded to questions. The prepared statement said:

> I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases–at least two cases there–have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops. When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl. There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being. And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police

the rule. Thus, Gentile could describe the general nature of the defense without elaboration even if he knew or should have known that his statements had a substantial likelihood of materially prejudicing the trial.[364]

The Supreme Court addressed two issues in *Gentile*: first, whether regulating speech of attorneys participating in a pending case under the substantial likelihood of material prejudice test satisfies the First Amendment; and second, whether the "safe harbor provision" made Rule 177 void for vagueness. On each issue, the vote was five to four. No single opinion expressed the majority view on both issues.

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363. (continued)

> Department and at the District Attorney's office. Now, with respect tothese other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two-four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something. Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them. Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' checks were missing. Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box. If you look at the indictment very closely, you're going to see that these claims fall under $100,000. Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box. And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box. That's about all that I have to say.

Id. Questions from the floor followed.

364. *Id.* at 1048.

a. The Substantial Likelihood of Material Prejudice Test

The majority opinion on the first issue was written by Chief Justice Rehnquist and joined by Justices White, Scalia, and Souter (hereinafter the Rehnquist foursome).[365] The Rehnquist foursome held that the substantial likelihood of material prejudice standard for regulating attorney speech does not violate the First Amendment because attorney speech regarding pending cases can be regulated under a lesser standard than the clear and present danger standard for regulating what the media may publish.[366] Justice O'Connor concurred with this portion of the Rehnquist opinion to form a majority.[367]

Justice Kennedy, joined by Justices Marshall, Blackmun, and Stevens (hereinafter the Kennedy foursome) dissented. These justices opined that attorney speech cannot be regulated unless there is a clear and present danger or imminent threat of prejudice to an adjudicative proceeding. Looking to the history of Rule 177, the Kennedy foursome found that the drafters of ABA Model Rule meant for the substantial likelihood of material prejudice test to approximate the clear and present danger test.[368] Thus, the language of the rule did not violate the First Amendment.[369] The problem was the application of the rule in this case by the Nevada Supreme Court. The Kennedy foursome also found no proof of substantial likelihood of material prejudice from Gentile's statements[370] and that First Amendment protection of Gentile's comments was particularly important because it was political speech criticizing the government and its officials.[371]

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365. *Id.* at 1062-76.

366. *Id.*

367. *See id.* at 1081 (O'Connor, J., concurring).

368. *Id.* at 1037.

369. *Id.* at 1036 ("[I]nterpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.").

370. *Id.* at 1038. Justice Kennedy questioned whether extrajudicial statements by a defense attorney can ever prejudice the prosecution as there was no evidence produced of any case where such prejudice occurred. *Id.* at 1055.

371. *See supra* note 348. Gentile's defense was that the police committed the crimes.

b. Void for Vagueness

The Kennedy foursome joined by Justice O'Connor formed the majority opinion that held Rule 177 void for vagueness because the "safe harbor" provision leads attorneys to assume that they may state the general nature of a claim or defense without elaboration even if the statements have a substantial likelihood of material prejudice.[372] The Kennedy foursome found the words "general" and "without elaboration" to be too vague to provide sufficient guidance. Justice O'Connor found that Gentile had a strong argument that his comments at the press conference were protected by the safe harbor provision, but that Nevada also had a strong argument that Gentile's comments fell outside the safe harbor provision. Because the language of Rule 177 could provide strong support for both sides, Justice O'Connor opined that the rule was unconstitutionally vague.[373]

The Rehnquist foursome dissented in the part of the decision addressing the second issue. The four justices opined that Rule 177 was not void for vagueness in this case, because Gentile admitted that a primary purpose of his press conference was to influence potential jurors.[374] The "safe harbor provision" covers general statements of a claim or defense made without elaboration. In this case, Gentile's comments were obviously not general and not made without elaboration.[375]

3. Analysis of the Gentile Decisions

The most interesting divergence in the two *Gentile* opinions concerns the right of a defense counsel to reply to adverse publicity. The Kennedy foursome suggested that there should be a higher level of scrutiny to regulate speech by defense counsel than to regulate speech by government sources. These justices doubted whether extrajudicial statements by a defense attorney are even capable of materially prejudicing the government's case, thus, negating the need to regulate defense counsel speech at all.[376] They believed that only the rare case presents a danger of prejudi-

372. *Gentile*, 50 U.S. at 1048.

373. *Id.* at 1081-82 (O'Connor, J., concurring).

374. *Id.* at 1077. Gentile stated that he wanted to counter prejudicial pretrial publicity generated by the government. *Id.* at 1042-43.

375. *Id.* at 1078-79.

376. *Id.* at 1055 (citing several ABA and other sources showing that extrajudicial statements creating a danger of prejudicial publicity come primarily from the police, the prosecution, other government sources, and the community at large, not the defense).

cial publicity and empirical evidence shows that juries exposed to prejudicial publicity can disregard it. The Kennedy foursome also recognized that a legitimate part of a defense counsel's representation may involve media comment to protect the client's reputation and prevent abuse by the courts.[377] Defense counsel speech criticizing government officials in the performance of official duty is political speech of great concern to the public and, often in criminal cases, the police, prosecution, government sources, or the community at large have disseminated information adverse to the accused.[378] The Kennedy foursome opined that there should be no danger of prejudicial publicity when an accused replies to adverse publicity generated against him by others.[379]

The Rehnquist foursome flatly rejected the idea that an attorney has a self-help right of reply to combat adverse publicity generated by other sources.[380] They also rejected the conclusion that no prejudicial publicity

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377. *Id.* at 1058.

378. *Id.* at 1043.

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Id.

379. Many commentators believe that extrajudicial speech by attorneys in pending cases is not normally prejudicial and is usually beneficial to the public understanding of criminal justice. For these reasons the standard for regulating attorney speech should be elevated to the clear and present danger standard. *See* Erwin Chererinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); Berkowitz-Caballero, *supra* note 350, at 494.

380. *Gentile*, 50 U.S. at 1080 n.6.

> Justice Kennedy would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial despite its likelihood of influencing potential jurors, unless it actually would go so far as to cause jurors to be affirmatively biased in favor of the lawyer's client . . . such a test would be difficult, if not impossible, to apply . . . it misconceives

results when an attorney seeks to balance the publicity by replying to adverse publicity.[381]

Gentile upheld the substantial likelihood of material prejudice test to regulate attorney speech in pending cases. The decision did not address the constitutionality of the lesser reasonable likelihood test. The Second and Fourth Circuits have held that *Gentile* did not preclude regulation of attorney speech based on the reasonable likelihood test.[382]

2. New Model Rule 3.6

In response to *Gentile*, the ABA amended Model Rule 3.6 in 1994.[383] The amended Model Rule 3.6 retained the substantial likelihood of material prejudice standard for regulating attorney speech.[384] Two major changes were made to Model Rule 3.6. First, the list of subjects upon

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380. (continued)

> the constitutional test for an impartial juror–whether the juror can lay aside his impression or opinion and render a verdict on the evidence presented in court . . . . A juror who may have been initially swayed from open-mindedness by publicity favorable to the prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant. . . . A defendant may be protected from publicity by, or in favor of, the police and prosecution through voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds. The remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor.

Id.

381. *Id.* For an argument that restrictions on trial participant speech effectively combat the prejudice resulting from extensive media coverage. *See* Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995).

382. *See In re* Morrissey, 168 F.3d 134 (4th Cir. 1999); United States v. Cutler, 58 F.3d 825 (2d Cir. 1995).

383. *See* TRIAL PUBLICITY, CERTIFICATION UNDERGO MODEL RULE CHANGES, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 243 (Aug. 24, 1994) [hereinafter TRIAL PUBLICITY] (discussing ABA amendments to the Model Rules of Professional Conduct regarding trial publicity).

384. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994). The rule reads as follows:

> Model Rule 3.6 (Trial Publicity) (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make

which extrajudicial comment is likely to have a substantial likelihood of material prejudice is moved from the rule to the comment.[385] Second, the "safe harbor provision" is replaced by a "right to reply" provision.[386] The new provision allows a lawyer to protect his client from substantial prejudicial effect of recent adverse publicity not initiated by the lawyer or his client. The right to reply is limited to information needed to mitigate recent adverse publicity and applies even if the reply may have a substantial likelihood of materially prejudicing an adjudicative proceeding.[387] The language of new Rule 3.6 makes the right to reply equally applicable to the government and to the defense.

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384. (continued)

> an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. (b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the person involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of anystep in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1)-(6): (I) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation. (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity. (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Id.

385. *Id.* Rule 3.6 cmt.

386. *Id.* Rule 3.6 (c). This section was, apparently approved over the objection of the Department of Justice. *See* TRIAL PUBLICITY, *supra* note 383, at 243.

387. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6.

3. Armed Services' Rules of Professional Responsibility–Trial Publicity

Each of the services has a rule of professional responsibility that governs trial publicity.[388] Army Rule 3.6, like all of the service rules on trial publicity, is nearly identical to Nevada Supreme Court Rule 177 (Rule 177), at issue in *Gentile*.[389] Both rules restrict attorney speech based on the substantial likelihood of materially prejudice standard.[390] Both rules list the same statements that are ordinarily likely to materially prejudice a

388. Although this article discusses Army Rule 3.6 in depth, each of the services currently has an ethical rule governing trial publicity that is similar to Nevada Rule 177 challenged in *Gentile*. *See* AR 27-26, *supra* note 24, Rule 3.6; U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803-1A, NAVY AND MARINE CORPS RULES OF PROFESSIONAL RESPONSIBILITY (13 July 92) [with three change transmittals: CH 1, 12 Jul 93; CH 2,27 Jun 94; CH 3, 30 May 96]; U.S. DEP'T OF COAST GUARD, COMMANDANT INSTR. M5810.1C, MILITARY JUSTICE MANUAL, CH. 6 (STANDARDS OF CONDUCT AND ABA STANDARDS); Policy Letter No. 26, Office of the Judge Advocate General, United States Air Force, subject: Air Force Rules of Professional Conduct and the Air Force Standards for Criminal Justice (undated).

389. *Army Regulation 27-26*, Rule 3.6 is identical to the Nevada Rule 177 challenged in *Gentile*, except that it is slightly more extensive. The provisions in Rule 3.6(b)(7) and 3.6(d) are unique to the Department of the Army and are not in Nevada Rule 177. *See* AR 27-26, *supra* note 24.

390. *Army Regulation 27-26*, Rule 3.6 (Tribunal Publicity) states:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, discharge from the Army or other adverse personnel action and that statement relates to:
>
> (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;
>
> (5) information the lawyer knows or reasonably should know is likely

proceeding.[391] Finally, both rules have a "safe harbor provision" with

390. (continued)

> to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;
>
> (6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or
>
> (7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense. This does not preclude the lawyer from commenting on such matters in a representational capacity.
>
> (c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
>
> (1) the general nature of the claim or defense;
>
> (2) the information contained in a public record;
>
> (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
>
> (7) in a criminal case:
>
> (i) the identity, duty station, occupation, and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time, and place of apprehension; and
>
> (iv) the identity of investigating and apprehending officers or agencies and the length of the investigation.
>
> (d) The protection and release of information in matters pertaining to the Army is governed by such statutes as the Freedom of Information Act and Privacy Act, in addition to those governing protection of national defense information.

AR 27-26, *supra* note 24, Rule 3.6. In addition, regulations of the Department of Defense, the Department of the Army, The Judge Advocate General, Corps of Engineers, and U.S. Army Material Command may further restrict the information that can be released or the source from which it is to be released.

391. *Id.* The statements ordinarily likely to materially prejudice an adjudicative proceeding in Nevada Rule 177 are all included in the Army rule. *Army Regulation 27-26(b)(7)* adds an additional statement about the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense unless commented upon by a lawyer in a representational capacity.

seven categories of information a lawyer involved in an investigation or litigation may state without elaboration, notwithstanding the prohibitions in the rest of the rule.[392]

None of the armed services has implemented new Model Rule 3.6.[393] Each service trial publicity rule continues to allow the same "safe harbor provision" found to be void for vagueness in *Gentile*.[394] Thus, all of the armed services' ethics rules governing trial publicity are void for vagueness and may not be enforceable. None of the current service ethics rules on trial publicity authorize any right to reply for the government or the defense.[395]

The Supreme Court has not heard a case involving new Model Rule 3.6. There are strong void for vagueness arguments against the new Model Rule. The Rehnquist foursome in *Gentile* warned that a self-help right to reply would be "difficult, if not impossible to apply."[396] New Model Rule 3.6 affords a lawyer the right to reply to protect a client from "substantial undue prejudicial effect of recent publicity not initiated by the lawyer or his client."[397] How can one determine how much prejudice is "substantial"? What is the definition of "recent"? Does the prejudicial publicity have to originate with someone other than the client or does the initiation of any publicity by the client preclude the right to reply? These are all questions of degree, as were the words "general" and "elaboration" that caused the vagueness in *Gentile*.[398] Finally, routine publications by the government that are allowed by trial publicity rules, such as the fact that

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392. Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991) ("Safe harbor provision" is the term used by the Supreme Court in Gentile to describe that part of the ethics rule that allows attorneys to make certain enumerated extrajudicial statements even if they are substantially likely to prejudice an adjudicative proceeding). *See also* AR 27-26, *supra* note 24, Rule 3.6 (c); Nevada Supreme Court Rule 177(3).

393. *See* Army, Air Force, and Navy rules, *supra* note 388.

394. *Gentile*, 501 U.S. at 1030.

395. Both the Army and Air Force Media Guides cite new Model Rule 3.6 for its statement that there is a right to reply under military ethics rules. Unless and until the services adopt new Model Rule 3.6, this guidance is not correct. *See* U.S. ARMY PUBLIC AFFAIRS, MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE 7,10 (Nov. 1998); U.S. AIR FORCE, MEDIA RELATIONS IN HIGH VISIBILITY COURT-MARTIAL CASES, A PRACTICAL GUIDE 6 (Feb. 1998).

396. *Gentile*, 501 U.S. at 1080 n.6. *See* Kelly, *supra* note 350 (discussing vagueness problems with new Model Rule 3.6).

397. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

398. 501 U.S. at 1048-49. *See* United States v. McVeigh, 964 F. Supp. 313 (D. Colo. 1997) (denying defense counsel right to reply because it is impossible to define the scope of the right).

an investigation is ongoing, the arrest of an accused, and the substance of the charges against an accused cannot help but create adverse publicity towards an accused, even if they are accompanied by a caveat that the charges are only allegations and the accused is presumed innocent until proven guilty. These routine publications harm an accused's standing in the community and should trigger a right to reply by the accused under the new Model Rule. The accused's reply may then trigger a government right of reply. This circular result creates a strong risk that a right to reply provision may swallow the rule and render it unenforceable.

All of the services need to update their ethics regulations dealing with trial publicity. At a minimum, the "safe harbor" language found void for vagueness in *Gentile* should be deleted from the rule. Each service should then assess whether to adopt new Model Rule 3.6 in its entirety, thereby affording the parties a right of reply to adverse publicity or whether to adopt an ethics rule without any "safe harbor provision." Arguably, under the Kennedy rationale in *Gentile*, the defense may have a constitutional basis for asserting a right to reply.[399] The majority, however, rejected this reasoning.[400]

C. Gag Orders

1. Media Challenges

Like ethics rules, gag orders restrain extrajudicial speech or disclosures in criminal cases. There are two major distinctions between gag orders and ethics rules. First, gag orders can apply to all trial participants where ethics rules apply only to attorneys.[401] Second, gag orders are an optional exercise of authority by trial courts on a case-by-case basis, whereas ethics rules apply to all cases in the jurisdiction.

Participant gag orders restrain the persons gagged from exercising their First Amendment right to free speech. Gag orders also affect the media in that they prevent the media from gathering the news. Gag orders are subject to challenge by the media, by the person gagged, or by both.

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399. *Gentile*, 501 U.S. at 1043, 1055-56.

400. *Id.* at 1080, n.6.

401. Ethics rules often require attorneys to exercise supervision over the speech of agents or subordinates, however, the rules are directed towards attorneys only.

Historically, gag order jurisprudence has been unclear and inconsistent. The Supreme Court has repeatedly declined to set forth a level of scrutiny required to sustain gag orders.[402] The circuits and the states have applied varying levels of scrutiny in reviewing gag order challenges. The Second, Fifth, Ninth and Eleventh Circuits distinguish between gag orders challenged by the media and gag orders challenged by the person gagged.[403] These courts afford more strict scrutiny to gag orders challenged by persons gagged than to gag orders challenged by the media or other third parties.[404] The reasons for the differing standards of scrutiny is that gag orders to trial participants are prior restraints because they directly impact on the right of the persons gagged to freely express themselves. The same gag orders are only indirect restraints on the media.

Although these circuits agree that media challenges to gag orders receive lesser scrutiny than participant challenges, the scrutiny applied to media challenges is not consistent. The Fifth Circuit affirmed a gag order justified by a substantial likelihood of prejudicial publicity but did not require the trial court to consider alternatives to enjoining speech.[405] The Second and Ninth Circuits uphold gag orders challenged by the media if there is a reasonable likelihood that pretrial publicity would prejudice a

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402. *See In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co. v. Simon, 488 U.S. 946 (1988) (denying certiorari in case where media challenged participant gag order based on reasonable likelihood that pretrial publicity would prejudice accused's right to fair trial); United States v. Davis, 902 F. Supp. 98 (E.D. La. 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998) (denying certiorari in case where trial court held that participant gag order is not a prior restraint on the media).

403. *See* United States v. Salameh, 992 F.2d 45, 446-47 (2d Cir. 1993) (defendant's challenge); *In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co., 488 U.S. 946 (1988) (media challenge); News-Journal Corp. v. Foxman, 939 F.2d 1499 (11th Cir. 1991) (media challenge); Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443 (9th Cir. 1985) (media challenge); Levine v. United States Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985) (defense challenge); United States v. Davis, 902 F. Supp. 98 (E.D. La 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998) (media challenge). *See also* South Bend Tribune v. Elkhart Circuit Court, 691 N.E.2d 200 (Ind. Ct. App. 1998) (media challenge); State *ex rel* The Missoulian v. Montana 21st Judicial Dist. Court, 933 P.2d 829, 843 (Mont. 1997) (media challenge).

404. *Id.*

405. *See Davis*, 902 F. Supp. at 103. *See also State ex rel The Missoulian*, 933 P.2d at 843 (Mont. 1997) (holding that scrutiny for media challenges to gag orders is greater than reasonable likelihood but less than clear and present danger–applies the substantial probability test); State *ex rel* NBC v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (applying substantial probability test).

fair trial.[406] The Eleventh Circuit recognizes the split in authority as to a standard of scrutiny applicable to gag orders, but has not ruled on an appropriate standard for its courts.[407]

Even the circuits employing the reasonable likelihood standard apply it differently. The Second Circuit requires the trial court to consider, on the record, whether alternatives to enjoining speech, either individually or in combination, could remedy the effect of prejudicial pretrial publicity.[408] The Ninth Circuit, on the other hand, does not require the trial court to consider alternatives before issuing a gag order in a case where the person gagged is not challenging the order.[409]

The Sixth Circuit applies strict scrutiny to all gag orders, whether they are challenged by the media or by the person gagged.[410] Courts following the Sixth Circuit hold that gag orders restrain the media's First Amendment right to gather news.[411] These courts apply the same clear and present danger standard to gag orders affecting media news-gathering as the Supreme Court applies to restraints of media publications.[412] Such orders are presumed unconstitutional.[413]

In 1988, the Supreme Court had an opportunity to reconcile the differing circuit opinions regarding the level of scrutiny that should attach to gag orders when challenged by the media. The court declined certiorari in *In re Application of Dow Jones & Co.*, a Second Circuit case involving a

406. *See In re Application of Dow Jones & Co.*, 842 F.2d at 611; *Radio & Television News Ass'n*, 781 F.2d at 1443.

407. *News-Journal Corp.*, 939 F.2d at 1515 n.18.

408. *See In re Application of Dow Jones & Co.*, 842 F.2d at 611.

409. *See Radio & Television News Ass'n*, 781 F.2d at 1443 (declining to require consideration of alternatives).

410. United States v. Ford, 830 F.2d 596 (6th Cir. 1987) (challenge by accused); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (challenge by media).

411. For examples of participant gag orders held to be prior restraints on the media's right to gather news. *See, e.g.*, Journal Publ'g Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (order to jurors); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (order to trial participants); Connecticut Magazine v. Moraghan, 676 F. Supp. 38 (D. Conn. 1987) (order to trial attorneys).

412. *Id. See* Nebraska Press Ass'n v. Stuart, 27 U.S. 539 (1976) (applying clear and present danger test to prior restraint on media publication allegedly prejudicing a pending criminal case).

413. *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

media challenge to a participant gag order requested by the defense.[414] The Second Circuit held that a lesser standard was required to uphold a gag order challenged by the media than the same gag order challenged by a person restrained by it and that a gag order challenged by someone other than the person gagged is justifiable if there is a reasonable likelihood that pretrial publicity would prejudice the defendant's right to a fair trial and alternatives to enjoining speech have been considered and rejected.[415]

Three justices would have granted certiorari to decide: first, whether there should be a higher level of scrutiny for gag orders challenged by persons restrained than for the same gag order challenged by the media; and second, to set forth a standard for gag order challenges to clear up the inconsistent standards applied by the circuits.[416]

In 1998, the Supreme Court again declined certiorari in a Fifth Circuit case upholding a gag order challenged by the media.[417] In this case the trial court followed the Second and Ninth Circuits' reasoning that gag orders challenged by the media receive a lesser level of scrutiny than those challenged by persons gagged. The trial court upheld the gag order finding a substantial likelihood of material prejudice to the trial, without considering alternatives to the gag order.[418]

2. Participant Challenges

The Supreme Court has allowed gag orders challenged by the media to stand if they are based on a reasonable likelihood of material prejudice to the proceedings.[419] Alternatives to the gag order do not have to be considered.[420] The remaining issue is the level of scrutiny required to withstand participant challenges to gag orders.

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414. The case involved racketeering charges of numerous defendants, including state and local elected officials, based on their involvement with Wedtech, a New York defense contractor. *See In re* Application of Dow Jones & Co., 842 F.2d 603 (2d Cir.), *cert. denied*, Dow Jones & Co. v. Simon, 488 U.S. 946 (1988).

415. *Id.* at 608-09.

416. *Dow Jones & Co.*, 488 U.S. at 946 (denying certiorari to *In re* Dow Jones & Co, 842 F.2d 603 (1988) (White, J., dissenting)).

417. United States v. Davis, 902 F. Supp. 98, 103 (E.D. La. 1995), *aff'd* 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998).

418. *Id.*

419. *See id.*; *Dow Jones & Co.*, 488 U.S. at 946 (White, J., dissenting).

420. *Davis*, 902 F. Supp. at 103.

Gentile v. State Bar of Nevada, held that speech of attorneys participating in pending cases may be regulated based on a substantial likelihood of material prejudice. The case concerned a Nevada ethics rule that applied in every case tried in Nevada, thus, there was no requirement for trial courts to consider and reject alternative measures to control publicity.[421] Post-*Gentile* cases addressing participant challenges to gag orders cite *Gentile* as the bottom line level of scrutiny required for such gag orders.[422] Nevertheless, some of these cases uphold participant gag orders on the lesser reasonable likelihood standard.[423] Others cases require the heightened clear and present danger standard to uphold gag orders within their jurisdictions.[424]

Post-*Gentile* cases have consistently ruled that trial courts may impose gag orders on trial participants to the same extent as they can upon attorneys.[425] This is consistent with the language of the Supreme Court in *Gentile*.[426]

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421. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

422. *See* United States v. Salameh, 992 F.2d 445 (2d Cir. 1993); FTC v. Freecom Communications, 966 F. Supp. 1066 (D. Utah 1997); United States v. Walker, 890 F. Supp .954 (D. Kan. 1995); Twohig v. Blackmer, 918 P.2d 332 (N.M. 1996) (recognizing *Gentile* bottom line standard of substantial likelihood of prejudice, but, adopting clear and present danger test for New Mexico gag orders); State v. Bassett, 911 P.2d 385 (Wash. 1996) (en banc); James v. Hines, No. 98-CA-001955-OA, 1998 Ky. App. LEXIS 71 (Ky. App. Aug. 17, 1998).

423. *See Bassett*, 911 P.2d at 385 (holding that a gag order may be based on reasonable likelihood of prejudice); *James*, 1998 Ky. App. LEXIS 71 (applying reasonable likelihood of prejudice standard).

424. *See Twohig*, 918 P.2d at 332 (recognizing *Gentile* bottom line standard of substantial likelihood of prejudice, but, adopting clear and present danger test for New Mexico gag orders); Breiner v. Takao, 835 P.2d 637 (Haw. 1992) (applying clear and present danger standard).

425. *See* United States v. Cutler, 58 F.3d 825, 837 n.1 (2d Cir. 1995) (finding defense attorney disqualified from case for seven months remains associated with the defense to be subject to gag order); Pedini v. Bowles, 940 F. Supp. 1020 (N.D. Tex. 1996) (upholding contempt holding against witness who violated gag order); State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997) (holding the accused subject to gag order); People v. Buttafuoco, 599 N.Y.S.2d 419 (1993) (finding attorney for the wife of the accused a trial participant subject to ethics rules and gag order); James v. Hines, No. 98-CA-001995-OA, 1998 Ky. App. LEXIS 71 (Ky. App. Aug. 17, 1998) (finding the victim's family to be potential witnesses subject to gag order).

426. 501 U.S. at 1030. Rehnquist's opinion cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), to draw a distinction between participants and strangers to litigation to support limiting participant speech. *Gentile*, 501 U.S. at 1072-73.

The Supreme Court has yet to address a gag order case. Lower courts have been hostile to overbroad gag orders that are not narrowly tailored towards prohibiting only that speech substantially likely to materially prejudice a proceeding. For example, in *United States v. Salameh*, the Second Circuit overturned a gag order prohibiting defense counsel from publicly discussing anything about the case.[427] In *James v. Hines*, the family of three children killed in the Paducah, Kentucky, school shooting held a press conference where they released a psychiatric report on the accused and criticized the government prosecution of the case.[428] The trial court enjoined the attorneys, police, potential witnesses, and anyone considering civil litigation from making extrajudicial statements about the case. The Court of Appeals of Kentucky overturned the gag order, in part, stating that trial participants cannot be prohibited from criticizing the government or from discussing anything already in the public domain. However, participants can be enjoined from disseminating information obtained through the litigation process that is not in the public domain, such as the accused's psychiatric report.[429]

In *Seattle Times Co. v. Rhinehart*, the Supreme Court held that trial courts may enjoin dissemination of information gained through the litigation process but may not enjoin dissemination of the same information if gained from a source not associated with the litigation.[430] This distinction should also apply to gag orders. The infringement upon First Amendment free speech rights of trial participants is not as great when they would not have had the information they are releasing or discussing but for their participation in the litigation.

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427. *Salameh*, 992 F.2d at 445. *See also* Breiner v. Takao, 835 P.2d 637 (Haw. 1992) (overturning gag order prohibiting counsel from communicating with the media about anything in the case); *Bassett*, 911 P.2d at 385 (same–in this case the trial judge denied defense counsel's request for a right to reply to adverse publicity); *Twohig*, 918 P.2d at 332 (striking down, under clear and present danger standard, gag order prohibiting communication with the media because there were no findings on the record to show the need for a gag order to combat a substantial likelihood of prejudice or clear and present danger to fair trial). *See also* Rodriguez v. Feinstein, 734 So. 2d 1162 (Fla. App. 1999) (citing *Salameh* and *Breiner*, to overturn gag order in a civil case that prohibited parties and counsel from discussing the case without leave of court).

428. *James*, 1998 Ky. App. LEXIS 71.

429. *Id.* at *9.

430. *Seattle Times Co.*, 467 U.S. at 34. The distinction drawn in *Seattle Times Co.* between participants and strangers to litigation was again cited by the Rehnquist opinion in *Gentile*. *See Gentile*, 501 U.S. at 1073.

Gag orders are not routine measures to be imposed in trials with extensive media publicity. The Supreme Court has repeatedly held that extensive publicity does not equate to prejudicial publicity.[431] Trial judges should make, on the record, case specific findings that gag orders against specified (not all) speech are necessary and narrowly tailored to mitigate prejudicial publicity and that alternatives were considered and rejected. Finally, gag orders should not preclude participants from criticizing the government or from discussing information in the public domain.[432]

c. Military Gag Orders

Military trial courts have inherent authority to impose gag orders.[433] There have been no significant post-*Gentile* reported military cases addressing the level of scrutiny that military courts would apply to gag orders.

The Joint Service Committee on Military Justice has proposed amending R.C.M. 806 to expressly authorize military judges to issue gag orders "to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members."[434] Notice of the proposed amendment has been published in the Federal Register for public comment.[435]

Proposed amendment R.C.M. 806(d) sets forth a constitutionally permissible standard for the military judge to issue gag orders. The proposed rule itself does not provide for party or media standing to be heard, however the discussion states that the military judge will conduct a hearing prior to issuing a gag order and afford parties and media standing.[436]

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431. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554, 565 (1976) (holding that cases involving prejudicial publicity are rare and that "pre-trial publicity–even pervasive publicity–does not inevitably lead to an unfair trial").

432. For an article suggesting that the scope of gag orders in high profile cases should change depending on the stage of the proceedings, see Minnefor, *supra* note 381, at 144-51.

433. *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966) (indicating that trial courts not only have authority but a duty to control court resources and participants to mitigate prejudicial pretrial publicity); United States v. Garwood, 16 M.J. 863, 868 (N.M.C.M.R. 1983) (upholding military judge's gag order).

434. *See* Notice of Proposed Amendments, 63 Fed. Reg. 25,835-37 (1998). The text of the proposed R.C.M. 806(d) is as at the Appendix.

435. *Id.*

436. *Id.*

There is nothing in the discussion or analysis that addresses the propriety of imposing gag orders to prevent political speech or speech criticizing military policies or government handling of a case. It is important to recognize that gag orders are meant to protect prejudicial information from leaking to potential jurors before the trial. Political speech critical of government activity is at the core of the First Amendment and should not be curtailed by gag orders. For example, there is a distinction between extrajudicial statements accusing the military of engaging in disparate treatment of officers and enlisted personnel in sex offenses and disclosures to the media of information gained through discovery about individual cases not already in the public record. The former is political speech that should not be prohibited by a gag order. The latter is prejudicial information and is the proper subject of a gag order.[437]

Finally, proposed amendment 806(d), as written, is silent as to what point in the proceedings the military judge has authority to impose a gag order. A court-martial against an accused does not begin until charges are referred to trial.[438] Nothing in the *Manual for Courts-Martial* expressly authorizes military judges to take pre-referral actions. Thus, gag orders under proposed amendment 806(d) will be ineffective to deter publicity occurring during the investigative and charging phases and during the Article 32 investigation. Nothing in the *Manual for Courts-Martial* authorizes convening authorities or Article 32 investigating officers to impose gag orders. However, there have been military gag orders imposed prior to referral.[439] To date no reported military case has addressed a challenge by the media or a gagged trial participant, to a gag order imposed prior to referral or one imposed by a convening authority or Article 32 investigating officer.[440]

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437. Such disclosures also violate ethics rules governing trial publicity. *See supra* text in Section V.B.

438. MCM, *supra* note 24, R.C.M. 601 (Referral), R.C.M. 103(8) (Definition of Court-Martial).

439. *See* Sue Anne Pressley, *Hate May Have Triggered Fatal Barracks Beating, Slain Soldier Had Been Taunted on Base as Secret Emerged About His Sexuality*, WASH. POST, Aug. 11, 1999, at A1 (stating that counsel and witnesses were under gag order during and after Article 32 investigation against the accused).

440. In many cases, the accused requests the gag order. If the parties agree to a gag order, and there is no media challenge, a gag order that may not otherwise withstand appellate review, will stand.

In federal and state criminal cases, the trial judge has authority to control pretrial publicity.[441] Proposed amendment 806(d) should expressly extend the military judge's authority to impose gag orders to begin when charges are preferred.

VI. Conclusion

The current Rules for Courts-Martial governing access to Article 32 investigations and courts-martial proceedings provide standards for closure that violate the media First Amendment right of access. Rule for Courts-Martial 405(h)(3) allows Article 32 investigations to be closed in the discretion of the commander who directs an Article 32 investigation or the investigating officer. Rule for Courts-Martial 806(b) allows courts-martial proceedings to be closed for good cause. Closure under these standards does not satisfy the compelling interest/individualized findings/narrowly tailored means test. The current closure rules lull counsel and trial courts into closing proceedings and sealing information without making findings on the record. There is also no express authority for the military judge to control and release judicial records filed in connection with a court-martial.

Both R.C.M. 405(h)(3) and R.C.M. 806 should be amended to incorporate the compelling interest/individualized findings/narrowly tailored means test to justify closing proceedings or sealing records to which the First Amendment right of access attaches. This test should be the rule for closure with or without defense objection. Rule for Courts-Martial 801(a)(3) should be amended to authorize military judges to control and release judicial records filed in connection with courts-martial. Finally, R.C.M. 405(h)(3) and R.C.M. 806 should provide for media notice and opportunity to be heard with respect to closure/sealing.

Suggested language to amend and combine R.C.M. 806(a) and (b)[442] is set forth below. Similar language can be used to amend R.C.M. 405(h)(3):

> 806(a) *Courts-martial proceedings.* Courts-martial shall be open to the public unless: (1) there is a compelling interest likely to

441. *See* Minnefor, *supra* note 381, at 146-50 (discussing pretrial stage gag orders).
442. R.C.M. 806 (a) and (b) currently read:

be prejudiced if the courtroom remains open, (2) closure is no broader than necessary to protect the compelling interest, (3) reasonable alternatives to closure were considered and rejected by the court, and (4) the court has made specific findings on the record to support closure.

Before a court-martial proceeding is closed, the military judge shall ensure that the public has notice of intent to close and an opportunity to be heard regarding closure, if requested. This section does not prohibit the military judge to reasonably limit the number of spectators in, and the means of access to, the courtroom in order to maintain the dignity and decorum of the proceedings or for other good cause.

The military judge's control over judicial records pertaining to courts-martial can be codified by amending R.C.M. 801(a)(3) to include records. Amended R.C.M. 801(a)(3) would read as follows: "[The military judge shall] subject to the code and this *Manual*, exercise reasonable control over the proceedings *and records* to promote the purposes of these rules and this *Manual*."

Lastly, the ethics rules governing trial publicity for each of the armed services are void for vagueness. Each service should review its rule and decide whether to adopt new Model Rule 3.6 with its limited right to reply provision. At a minimum, each service should delete the "safe harbor provision" that the Supreme Court found to be void for vagueness in *Gentile v. State Board of Nevada*.[443]

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442. (continued)

(a) *In general.* Except as provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes membersof both the military and civilian communities.

(b) *Control of spectators.* In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

MCM, *supra* note 24, R.C.M. 806.

443. 501 U.S. 1030 (1991).

Appendix

Proposed R.C.M. 806(d)

"R.C.M. 806(d) Protective orders. The military judge may, upon request of any party or sua sponte, issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members. For purposes of this subsection, "military judge" does not include the president of a special court-martial without a military judge.

"The following Discussion is added after R.C.M. 806(d):

"A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order's likely effectiveness in ensuring an impartial court-martial panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.

"The Analysis accompanying R.C.M. 806(d) is created as follows:

"*1999* Amendment: Section (d) was added to codify the military judge's power to issue orders limiting and trial participants' extrajudicial statements in appropriate cases. *See* United States v. Garwood, 16 M.J. 863, 868 (N.M.C.M.R. 1983) (finding military judge was justified in issuing restrictive order prohibiting extrajudicial statements by trial participants), *aff'd on other grounds*, 20 M.J. 148 (C.M.A. 1985); United States v. Clark, 31 M.J. 721, 724 (A.F.C.M.R. 1990) (suggesting, but not deciding, that the military judge properly limited trial participants' extrajudicial statements).

"The public has a legitimate interest in the conduct of military justice proceedings. Informing the public about the operations of the criminal justice system is one of the "core purposes" of the First Amendment. In the appro-

priate case, where the military judge is considering issuing a protective order, absent exigent circumstances, the military judge must conduct a hearing prior to issuing such an order. Prior to such a hearing the parties will have been provided notice. At the hearing, all parties will be provided an opportunity to be heard. The opportunity to be heard may be extended to representatives of the media in the appropriate case.

"Section (d) is based on the first Recommendation Relating to the Conduct of Judicial Proceedings in Criminal Cases, including in the Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 87 F.R.D. 519, 529 (1980), which was approved by the Judicial Conference of the United States on September 25, 1980. The requirement that the protective order be issued in writing is based on R.C.M. 405(g)(6). Section (d) adopts a "substantial likelihood of material prejudice" standard in place of the Judicial Conference recommendation's "likely to interfere" standard. The Judicial Conference's recommendation was issued before the Supreme Court's decision in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *Gentile*, which dealt with a Rule of Professional Conduct governing extrajudicial statements, indicates that a lawyer may be disciplined for making statements that present a substantial likelihood of material prejudice to an accused's right to a fair trial. While the use of protective orders is distinguishable from limitations imposed by a bar's ethics rule, the *Gentile* decision expressly recognized that the "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and the cases which preceded it," 501 U.S. at 1074. The Court concluded that "substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1075. *Gentile* also supports the constitutionality of restricting communications of non-lawyer participants in a court case. *Id.* at 1072-73 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)). Accordingly, a protective order issued under the "substantial likelihood of material prejudice" standard is constitutionally permissible.

"The first sentence of the discussion is based on the committee comment to the Recommendations Relating to the Conduct of Judicial Proceedings in Criminal Cases. 87 F.R.D. at 530. For a definition of "party," see R.C..M. 103(16). The second sentence of the discussion is based on the first of the Judicial Conference's recommendations. *Id.* at 532; United States v. Salameh, 992 F.2d 445, 447 (2d Cir 1993 (per curiam), and *In re*

Application of Dow Jones & Co., 842 F.2d 603, 611, 612 n. 1 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988). The fourth sentence is based on *Salameh*, 992 F.2d at 447. The fifth sentence is based on *In re Halkin*, 598 F.2d 196-97 (D.C. Cir. 1979), and Rule for Courts-Martial 905(d)."